91-1337

Supreme Court, U.S.
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No. -

In the
Supreme Court of the United States

OCTOBER TERM, 1991

JAMES L. McCOY, ADMINISTRATOR OF
THE ELECTRICAL WORKERS TRUST FUNDS,
LOCAL 103 I.B.E.W.,
PETITIONER,

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether trust funds established pursuant to § 302(c)(9) of the Labor Management Relations Act of 1947, as amended ("LMRA"), 29 U.S.C. § 186(c)(9), are as a matter of law necessarily "employee welfare benefit plan[s]" within the meaning of § 3(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(1).

II. Whether the First Circuit deviated from this Court's precedents regarding review of motions to dismiss where it found the Educational Fund to be an employee welfare benefit plan despite no allegation in the complaint to that effect.

III. Whether § 514(a) of ERISA pre-empts Massachusetts G.L. c. 254 which permits any person, including but not limited to general contractors, laborers, subcontractors, trustees of § 302 funds, who improves the property to file a lien upon the pool of funds left owed but unpaid under the contract between the owner of the property and the general contractor at the time the lien is filed and secured by the owner's property.

IV. Whether the remedy provided by Massachusetts G.L. c. 254 is a remedy permissible under Rule 64 of the Federal Rules of Civil Procedure and thereby saved from pre-emption by virtue of § 514(d) of ERISA.

V. Whether Rule 64 of the Federal Rules of Civil Procedure, which incorporates by reference existing state law creditor prejudgment remedies creating substantive rights, would be rendered invalid by the Rules Enabling Act, 28 U.S.C. § 2072.

VI. Whether § 515 of ERISA, 29 U.S.C. § 1145, and § 301(a) of the LMRA, 29 U.S.C. § 185(a), would be altered, amended, modified, invalidated, impaired or superseded by pre-emption of Massachusetts G.L. c. 254, and is thereby saved from pre-emption by virtue of § 514(d) of ERISA.

PARTIES

The petitioner for this writ of certiorari is James L. McCoy, Administrator of the Electrical Workers Trust Funds, Local 103 I.B.E.W. The respondent is the Massachusetts Institute of Technology. The petitioner was the appellant in the United States Court of Appeals for the First Circuit and the respondent was the appellee in that court.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
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PETITION FOR WRIT OF CERTIORARI

Petitioner, James L. McCoy, Administrator of the Electrical Workers Trust Funds, Local 103 I.B.E.W., respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the First Circuit entered in this case on November 19, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit has not yet been officially reported, but has been reported at 14 Employee Benefit Cases 1874. The opinion of the District Court upon which this appeal is based is reported at 760 F. Supp. 12 (D. Mass. 1991). Both opinions are reprinted in the Appendix to this petition (Appendix A and C).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the First Circuit issued an opinion affirming the judgment of the District Court on November 19, 1991 and judgment entered that same day (Appendix B, *infra*). Petitioner seeks review of this judgment pursuant to 28 U.S.C. § 1254(1). This petition is timely filed with this Court under the provisions of 28 U.S.C. § 2101(c).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are: (1) Massachusetts G.L. c. 254, § 4; Massachusetts G.L. c. 254, § 1; § 502(g)(2) of Employee Retirement Income Security Act of 1974, as amended (hereinafter "ERISA"), 29 U.S.C. § 1132(g)(2); § 505 of ERISA, 29 U.S.C. § 1135; § 514(a) of ERISA, 29 U.S.C. § 1144(a); § 514(d) of ERISA, 29 U.S.C. § 1144(d); § 515 of ERISA, 29 U.S.C. § 1145; § 3(1) of ERISA, 29 U.S.C. § 1002(1); § 301(a) of the Labor Management Relations Act of 1947, as amended (hereinafter "LMRA"), 29 U.S.C. § 185(a); § 302(c) of the LMRA, 29 U.S.C. § 186(c); 28 U.S.C. § 2072, Rules 64 and 69(a) of the Federal Rules of Civil

Procedure; § 6 of the Labor Management Cooperation Act of 1978 (hereinafter "LMCA"), 90 Stat. 2020; Department of Labor ("DOL") Adv. Op. 91-08A; DOL Adv. Op. 84-40A. These statutes and opinions are set forth in Appendix F, G and H, *infra*.

STATEMENT OF THE CASE

A. BASIS FOR FEDERAL JURISDICTION

The basis for federal court jurisdiction is at issue in this action. This action, originally filed by petitioner James L. McCoy in state court, was removed purportedly pursuant to 28 U.S.C. §1331 and § 1441. Respondent Massachusetts Institute of Technology moved to dismiss petitioner's complaint and petitioner moved to remand pursuant to 28 U.S.C. § 1447 (c). The district court granted respondent's motion to dismiss based solely on ERISA pre-emption grounds and denied petitioner's motion to remand.

B. FACTUAL BACKGROUND

James L. McCoy (hereinafter "McCoy") is the administrator and/or agent of various trust funds established pursuant to the requirements of 29 U.S.C. § 186, including pension, annuity, health and welfare, holiday, vacation and supplementary unemployment, apprenticeship and educational funds (hereinafter the "Funds") (Appendix E, *infra*). S.N. Brown Electrical Corp. was a subcontractor performing work on property owned by the Massachusetts Institute of Technology (hereinafter "MIT"). S.N. Brown Electrical Corp. was also an employer obligated to make contributions to the Funds under a collective bargaining agreement on behalf of workers who performed labor on MIT's property. S.N. Brown Electrical Corp. became delinquent

and failed to make these contributions, in an estimated principal amount of $30,000. On May 23, 1990, McCoy filed a Notice of Contract in the Middlesex County Registry of Deeds pursuant to the statutory provisions of Massachusetts G.L. c. 254, § 4 and thereafter filed a Sworn Statement of Account and a complaint to enforce the lien pursuant to the provisions of Chapter 254 in Massachusetts state court.

C. PROCEDURAL HISTORY

The complaint to enforce the lien was filed by McCoy on July 17, 1990 in the Middlesex Superior Court, Middlesex County, Cambridge, Massachusetts and was subsequently removed to the United States District Court for the District of Massachusetts on or about August 7, 1990. MIT filed a motion to dismiss McCoy's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure arguing that Massachusetts G.L. c. 254 was pre-empted by § 514(a) of ERISA. McCoy moved to remand the action back to the state court from which it was removed pursuant to 28 U.S.C. § 1447(c), arguing that ERISA did not pre-empt Massachusetts G.L. c. 254. McCoy also argued that even if § 514(a) pre-empts Massachusetts G.L. c. 254, pre-emption applies only to those funds which were employee benefit plans covered by ERISA, and the educational fund was not alleged to be and was not such a plan. Finally, McCoy argued that Chapter 254 was saved from pre-emption by § 514(d) of ERISA, because pre-emption would modify or impair federal law, namely Rule 64 of the Federal Rules of Civil Procedure. Oppositions were timely filed by McCoy to the motion to dismiss and by MIT to the motion to remand.

On March 5, 1991, judgment was entered by the district court denying McCoy's motion to remand and allowing MIT's motion to dismiss, by Memorandum and Order dated March 1, 1991 (Appendix D, *infra*). McCoy timely filed his appeal to the United States Court of Appeals for the First Circuit on

March 29, 1991. On November 19, 1991, the United States Court of Appeals for the First Circuit affirmed the district court's decision (Appendix B, *infra*).

REASONS THE WRIT SHOULD BE GRANTED

I. The Decision Of The First Circuit That § 302(c)(9) Trust Funds Are Employee Welfare Benefit Plans As A Matter Of Law Is In Direct Conflict With § 3(1) of ERISA, § 302(c)(9) of the LMRA, The Department Of Labor's Interpretation, And Involves An Important Question of Federal Law Warranting This Court's Review.

The determination of which types of trust funds are or are not subject to the requirements of Title I of ERISA are important questions of federal law with significant ramifications for those funds and those who advise them. Prior to the First Circuit's decision, no court or federal agency had ever before held that trust funds established pursuant to § 302(c)(9) of the LMRA, 29 U.S.C. § 186(c)(9), were "employee welfare benefit plan[s]" as defined by § 3(1)(B) of ERISA, 29 U.S.C. § 1002(1)(B). Indeed the federal agency charged with interpreting ERISA had specifically opined on two separate occasions that § 302(c)(9) funds were not employee welfare benefit plans subject to Title I of ERISA.[1]

In finding all § 302(c) plans and specifically the Electrical Workers Educational and Cultural Fund, Local 103 I.B.E.W. (the "Educational Fund"), a § 302(c)(9) trust, to be an employee welfare benefit plan despite the lack of any allegation in the

[1] The Department of Labor is given the authority to interpret Title I of ERISA by § 505 of ERISA, 29 U.S.C. § 1135. As the federal agency charged with implementing and interpreting Title I of ERISA, the Department's consistent and longstanding interpretation of § 3(1) of ERISA "commands considerable deference." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 107 (1979). DOL Adv. Op. 91-08A and 84-40A are set forth in Appendix F and G.

complaint to that effect,[2] the First Circuit misconstrued § 3(1)(B) of ERISA and 302(c)(9) of the LMRA and ignored the Department of Labor's interpretation of § 3(1)(B) of ERISA. This important question of federal law warrants this Court's review.

Section 302(a) of the LMRA as enacted in 1947 prohibited employers from making payments or giving anything else of value to unions and their representatives and provided criminal penalties for violation of its provisions. Congress provided various exceptions from this prohibition in § 302(c). Section 302(c)(9) was added by P.L. 95-524, 90 Stat. 2020, the Labor Management Cooperation Act of 1978 (hereinafter the ("LMCA"). Section 6(d) of the LMCA amended § 302(c) of the LMRA by adding an exception to the prohibitions of 302(a) of the LMRA "with respect to money or other things of value paid by an employer to a plant, area or industry-wide labor management committee established for one or more of the purposes set forth in § 5(b) of the Labor Management Cooperation Act of 1978."[3] Unlike employee benefit plans under Title I of ERISA, Congress in § 6 of the LMCA charged the Federal Mediation and Conciliation Service with oversight responsibility with respect to the LMCA rather than the Department of Labor.

Both the district court and the First Circuit read § 3(1)(B) of ERISA to mean that all § 302(c) funds must be "employee welfare benefit plan[s]." Section 3(1)(B) defines an "employee welfare benefit plan" as "any benefit described in § 302(c) of

[2] To state a claim under Massachusetts G.L. c. 254, § 4, there is no need to allege whether a plaintiff is an employee benefit plan, or subject to the requirements of ERISA. The complaint, a copy of which is contained in Appendix E, never alleged that the Funds were employee benefit plans, or that they were subject to the requirements of ERISA, or that they provided benefits or employee benefits.

[3] The reference to § 5(b) should read § 6(b), which contains the permissible purposes of § 302(c)(9) funds. Section 6 of the LMCA is reprinted in the Appendix.

the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." The First Circuit's reading of this section is flawed on two points. First, § 3(1)(B) was enacted in 1974 and therefore cannot be taken to include § 302(c)(9) which was added in 1978, especially where the reference to the LMRA in § 3(1)(B) is only to the LMRA as originally enacted, with no reference to amendments to the 1947 act. Second, by its own terms § 3(1)(B) applies only to "any benefit" described in § 302(c). Unlike § 302(c)(5), (6), (7) and (8), there is no requirement that § 302(c)(9) funds provide any benefits to employees of the employer.

The two times the Department of Labor has had occasion to interpret § 3(1)(B) of ERISA with respect to § 302(c)(9) funds, it found the § 302(c)(9) funds not to be employee welfare benefit plans as defined by § 3(1)(B) of ERISA. DOL Advisory Op. 91-08A and 84-40A (Appendix F and G, *infra*). In DOL Advisory Op. 91-08A, the Department of Labor stated that ". . . it is the Department's position that § 3(1)(B) of ERISA does not mean that every arrangement described in § 302(c) of the Labor Management Relations Act of 1947 (the LMRA) constitutes an employee welfare benefit plan within the meaning to [*sic*] § 3(1) of ERISA." (App. A45-A46). The First Circuit, however, concluded: "The complaint states that all the plans were 'established pursuant to the requirements of 29 U.S.C. § 186.' The plans are, therefore, employee welfare benefit plans within ERISA's purview." (footnote omitted). (App. A18). The Department of Labor's interpretation of § 3(1)(B) of ERISA is in direct conflict with the First Circuit's interpretation.

The First Circuit erroneously interpreted § 3(1)(B) of ERISA to include § 302(c)(9) funds. Furthermore, it did so on a motion to dismiss, despite the absence of any allegation that such funds provide benefits to employees and despite the contrary interpretation given § 3(1) by the Department of Labor. Given

the importance of this question to trustees of § 302(c)(9) funds, not only with respect to their right to file mechanics' liens, but also the uncertainty created as to whether § 302(c)(9) funds need to comply with the requirements of Title I of ERISA, the Court should grant certiorari to review the First Circuit's decision.

II. The First Circuit Deviated From This Court's Precedents Regarding Review Of Motions To Dismiss In Finding The Educational Fund To Be An Employee Welfare Benefit Plan Despite No Allegation In The Complaint To That Effect.

McCoy's complaint contained no allegation that any of the Funds were employee benefit plans. The complaint nowhere alleged that the Funds were subject to ERISA, or that any of the Funds provided benefits to participants and beneficiaries. Notwithstanding the absence of any allegations in the complaint that could lead one to conclude the Educational Fund was an employee welfare benefit plan, the district court so found and the First Circuit affirmed. This Court stated the standard of review applicable to reviewing a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure in *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974). That standard requires that the allegations of the complaint are taken as true and construed in a light most favorable to the non-movant. "'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed' for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974), quoting *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted).

In complete disregard for this standard, both the district court and the First Circuit construed the complaint as if the

Educational Fund had been alleged to be an employee benefit plan. Having turned on its head the standard of review applicable to a motion to dismiss by viewing the complaint in a light least favorable to the petitioner, the First Circuit then proceeded to saddle the petitioner with the burden of disproving the affirmative defense of pre-emption, by finding that McCoy failed to proffer evidence and argument that the Educational Fund was not an employee benefit plan before the district court.[4] Such a departure from this Court's established standard for reviewing a motion to dismiss warrants this Court's review.

III. The Continued Disregard By Courts of Appeal Of Congressional Intent To Preserve State Law Collection Remedies Is Contrary To This Court's Pre-emption Analysis And Is Depriving ERISA Plans Of The Ability To Collect Contributions, Warranting This Court's Review.

Each time the Court has considered whether § 514(a) of ERISA pre-empts a state law, it has stated the purpose of Congress to be "the ultimate touchstone." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 45 (1987). "In deciding whether a federal law preempts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). Recently the

[4] The First Circuit discusses at length that petitioner should have argued at greater length before the district court and apparently taken greater effort to prove the Educational Fund was not an employee welfare benefit plan (App. A16-A18). These statements overlook that MIT had the burden of proof with respect to its pre-emption affirmative defense and not the petitioner. Furthermore, a motion to dismiss tests only the sufficiency of the pleading; the petitioner need prove nothing at this stage. *Scheuer* v. *Rhodes*, 416 U.S. at 236. The petitioner did argue that preemption under § 514(a) of ERISA applies only if the Educational Fund is an employee benefit plan, and pointed out that it is not and was not alleged to be such a plan. In opposing a motion to dismiss, no more was needed. *Quinones* v. *Szorc*, 771 F.2d 289, 291 n.3 (7th Cir. 1985) (stating that "[i]t is axiomatic that, to withstand a motion to dismiss, a plaintiff is not required to provide evidence of or prove the truthfulness of his complaint.")

Court reaffirmed this principle: " '[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone.' " *Ingersoll-Rand Company* v. *McClendon*, 498 U.S. , 111 S.Ct 478, 112 L.Ed.2d 474 (1990). The First Circuit's decision, however, as well as decisions by other Circuit Courts of Appeal,[5] have disregarded or discounted Congressional statements that ERISA was intended to supplement, not to supercede, state laws used in the collection of contributions by multi-employer plans.

Congress considered the pre-emption of state law collection remedies when it amended ERISA in 1980 to add §§ 502(g)(2) and 515 to provide a cause of action to collect delinquent contributions owed to multiemployer plans.[6] Congressional statements from both the House Ways and Means Committee and the joint explanation of the Senate Labor and Finance Committee indicate that state collection remedies would not be superseded by this new ERISA cause of action. The joint ex-

[5] The pre-emption of state mechanics' lien statutes has been considered by three other United States Courts of Appeal which in each case found the state statute involved pre-empted by ERISA. *See Bricklayers and Allied Craftsmen Intern. Union Local 33 Benefit Funds* v. *America's Marble Source, Inc.*, F.2d , 1991 WL 253389 (3rd Cir. 1991); *Sturgis* v. *Herman Miller, Inc.*, 943 F.2d 1127 (9th Cir. 1991); *Iron Workers Mid-South Pension Fund* v. *Terotechnology Corp.*, 891 F.2d 548 (5th Cir.), *cert. denied*, 110 S.Ct. 3272 (1990). A majority of the California Supreme Court found its statute pre-empted. *Carpenters S. Cal. Admin. Corp.* v. *El Capitan Dev. Co.*, 53 Cal.3d 1041, 282 Cal.Rptr. 277, 811 P.2d 296 (Cal. 1991), *cert. denied*, U.S. , 112 S.Ct. 430 (1991). A Wisconsin appellate court found the Wisconsin state mechanic's lien statute not to be pre-empted by ERISA. *Plumbers Local 458 Holiday Vacation Fund* v. *Howard Immel, Inc.*, 151 Wis.2d 233, 445 N.W.2d 43 (Wis.App. 1989).

[6] ERISA as originally enacted did not contain collection remedies for multiemployer trust funds. As a result, there is an absence of any Congressional statements concerning the scope of pre-emption with respect to state law collection remedies. The legislative history to the Multiemployer Pension Plan Amendments Act of 1980 appears to contain the first discussion of pre-emption in the context of state law collection remedies. Prior to the 1980 amendments, courts had permitted collection of multiemployer contributions to be made under state or federal law. *See Sasso* v. *Vachris*, 66 N.Y.2d 28, 484 N.E.2d 1359, 494 N.Y.S.2d 856, 860 (1985) (and cases cited).

planation of the Senate Labor and Finance Committee to the Senate bill (S. 1076) concerning § 515 and § 502(g)(2) of ERISA stated:

> This [the amendments to ERISA] does not change any other type of remedy permitted under state or federal law with respect to delinquent multiemployer plan contributions.

(126 Cong. Rec. p. 20202, App. A65). A similar statement is contained in the Report of the House Ways and Means Committee on the companion House bill (H.R. 3904) to the Senate version cited above:

> The Committee's amendment provides that in the case of a civil action by any person to collect delinquent multiemployer plan contributions, *regardless of otherwise applicable law*, the court before which the action is brought may award the plaintiff (1) reasonable attorney's fees, (2) court costs, and (3) liquidated damages not to exceed 20 percent of the amount of delinquent contributions as determined by the court. However, these items are to be awarded to a plaintiff only to the extent that the multiemployer plan in question provided for such an award. The bill preempts any State or other law which would prevent the award of reasonable attorney's fees, court costs or liquidated damages or which would limit liquidated damages to an amount below the 20 percent level. However, the bill does not preclude the award of liquidated damages in excess of the 20 percent level where an award of such a higher level of liquidated damages is permitted under applicable State or other law. *The Committee amendment does not change any other type of remedy permitted under*

> *State or Federal Law with respect to delinquent multiemployer plan contributions.*

(H.R. Rep No. 889, 96th Cong., 2d Sess., Part II 48-49, reprinted in 1980 U.S. Code Cong. & Ad. News 2918, 3038) (emphasis supplied). At least two appellate courts have declined to find pre-emption under ERISA based upon these Congressional statements. *See Idaho Plumbers and Pipefitters Health and Welfare Fund* v. *United Mechanical Contractors, Inc.*, 875 F.2d 212 (9th Cir. 1989) ("The legislative history indicates that § 1132(g)(2) does not preempt alternative contractual remedies."); *Sasso* v. *Vachris*, 66 N.Y.2d 28, 484 N.E.2d 1359, 494 N.Y.S.2d 856 (1985). In analyzing this legislative history, the court in *Sasso* concluded:

> Thus, it is clear that both Houses of Congress viewed the enforcement amendments of 1980 as setting forth a floor of federal remedy in the case of delinquent contributions below which the states could not go but which did not preempt or supersede *state remedies* that granted greater protection than that contained in ERISA. Notably, this language in the legislative history also conflicts with the view that § 514(a) of ERISA preempts state remedies and provides additional support for our view that ERISA was never meant to preempt state enforcement statutes. . . .

Sasso v. *Vachris, supra* at n.3. *See also Plumbers Local 458 Holiday Vacation Fund* v. *Howard Immel, Inc.*, 151 Wis.2d 233, 445 N.W.2d 43 (Wis.App. 1989); *Retirement Fund of the Fur Manufacturing Industry* v. *Getto & Getto, Inc.*, 714 F. Supp. 651 (S.D.N.Y. 1989).

Congressional statements repeatedly emphasized that Congress enacted § 502(g)(2) and § 515 of ERISA to strengthen

collection of delinquent contributions, as stated by Senator Williams in commenting on H.R. 3904 and § 502(g)(2) and § 515:

> The public policy of this legislation to foster the private multiemployer plan system necessitates that provision be made to discourage delinquencies and simplify delinquency collection. The bill imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans. . . . The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies.

126 Cong. Rec. p. 23288.

Without review by this Court, the most effective collection remedies used by multiemployer plans will become unavailable, a result certainly not intended by Congress, which appeared to count upon state law remedies remaining available to supplement the new federal remedies.[7] As the First Circuit itself acknowledges in its decision, none of the concerns that motivated Congress to enact § 514(a) of ERISA are implicated by the pre-emption of state collection remedies.[8] On the contrary,

[7] It appears from the legislative history already quoted that Congress assumed that state law collection remedies would be available to supplement the new federal remedies being added by § 502(g)(2) and § 515 of ERISA. This conclusion is reinforced by the following colloquy between Senator Williams and Matsunaga: "MATSUNAGA. . . . One final question. . . . The bill directs the courts in delinquency cases to award a plan which wins judgment not only the delinquent contributions, but other costs and damages as well. Do these provisions constitute a maximum as well as a minimum restriction on the relief available to plans? Mr. WILLIAMS. . . . The provisions as we drafted and intended them, are a minimum but not a maximum." 126 Cong. Rec. p. 20180.

[8] The First Circuit appeared to disregard Congressional intent based upon its belief that it was bound by *dicta* in this Court's decision in *Mackey* v. *Lanier Collection Agency and Service, Inc.*, 486 U.S. 825 (1988) (App. A9-A10).

pre-emption of such laws undermines the ability of multiemployer funds to collect contributions, thereby threatening the solvency of such plans, precisely the concern of Congress in passing ERISA and the MPPAA.[9] It is time the Court reviewed this important issue of federal law which threatens to leave multiemployer plans without effective remedies to collect contributions owed by employers.

IV. The Court Should Grant Certiorari To Correct The First Circuit's Misapplication Of This Court's Decision In *Mackey* v. *Lanier Collection Agency & Service, Inc.* And To Resolve The Conflict Among Courts Over This Issue.

The First Circuit found pre-emption of Massachusetts G.L. c. 254 based upon footnote 12 of this Court's decision in *Mackey* v. *Lanier Collection Agency and Service, Inc.*, 486 U.S. 825, 838 (1988). There the Court stated:

> It is not incongruous to find that Ga. Code Ann. § 18-4-20 (Supp. 1987), which provides for garnishment of ERISA welfare benefit plans, escapes pre-emption under ERISA, while striking down § 18-4-22.1 — an exception to the general state-law provi-

[9] The federal cause of action added by Congress in § 515, and the damages provided by § 502(g)(2), are only useful against a solvent employer. In the majority of cases, like the case now before the Court, the employer is delinquent because it is in financial distress or bankruptcy, and multiemployer plans are generally but one of many creditors seeking to collect against a limited pool of assets. Unless multiemployer plans have the same state prejudgment security devices as do other creditors, their ERISA judgments will frequently be uncollectible once obtained, because other creditors were able to obtain liens on property that they could not. It is remarkable that ERISA-plans are the only class of creditors on construction projects who, if the First Circuit's decision is allowed to stand, cannot lien the pool of funds held to pay general contractors, subcontractors, laborers and material suppliers, and that it is ERISA, the federal statute Congress intended to be the salvation of employee benefit plans, which strikes them down.

> sion — as pre-empted. While we believe that state-law garnishment procedures are not pre-empted by § 514(a), we also conclude that *any* state law which singles out ERISA plans, by express reference, for special treatment is pre-empted. See part II, *supra*. It is this "singling out" that pre-empts the Georgia anti-garnishment exception.

The First Circuit erroneously interpreted footnote 12 to mean that even state laws which do not single out ERISA plans for special treatment are nonetheless pre-empted where the state law permits ERISA plans to have the same lien rights as other lien claimants. The First Circuit's reading of *Mackey* would preclude states from permitting § 302(c) trusts to use the same state lien and collection statutes generally applicable and used by other lien claimants or creditors. It would be incongruous, and undermine the very protection Congress sought to give plans by its enactment of ERISA, to read *Mackey* as meaning that state creditor and collection laws of general applicability are pre-empted only when used by ERISA plans and not when used against ERISA plans. Massachusetts G.L. c. 254 does not contain any provisions unique to ERISA plans or which in any way attempt to regulate such plans. Section 4 of Chapter 254 simply permits trustees of § 302(c) funds to file liens in the same manner as any other lien claimant on privately owned construction projects in Massachusetts. There is no singling out of ERISA plans for special treatment.[10] A better reading of

[10] An amendment to Massachusetts G.L. c. 254, § 4 was enacted in 1984 to provide that § 302 funds have the same lien rights as other persons under Chapter 254. The amendment was not necessary to the Funds' enforcement of such liens. *See Peters* v. *Hartford Accident and Indemnity Company*, 377 Mass. 863, 389 N.E.2d 63, 66 (1979) (stating Chapter 254 and complementary bonding statute provide protection for all creditors of either the original contractor or of a subcontractor of any degree, for labor performed or furnished, or for material furnished and actually used in the scope of the general contract.) The First Circuit's decision to preclude use of a general statute governing

this Court's decision in *Mackey* is set forth in *Plumbers Local 458 Holiday Vacation Fund* v. *Howard Immel, Inc.*, 151 Wis.2d 233, 445 N.W.2d 43, 46 (Wis.App. 1989). There the court, in describing the Wisconsin statute, declined to find pre-emption of a general mechanics' lien statute simply because ERISA-plans may also be a creditor or claimant under the statute:

> It is a remedy available to a certain class of creditors that transcends ERISA obligations and concerns. While one may readily understand court decisions holding that the collection of ERISA obligations may not be directed by state law, a decision holding that no general creditor's remedies may be utilized to collect judgments held by ERISA-regulated plans would be unfathomable. This holding would often leave funds without the means to enforce judgments.

The First Circuit's focus on footnote 12 caused it to overlook the holding of the Court in *Mackey*. There the Court concluded that "state-law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA. . . ." *Id.* at 834. This Court has also stated that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law "relates to" the plan." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983). Chapter 254, which imposes no obligations upon ERISA plans or in any way regulates them, certainly has less effect upon ERISA plans than the garnishment statute found by the Court in *Mackey* not to be pre-empted by § 514(a)

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construction on Massachusetts' private property is not warranted by footnote 12 of *Mackey*; even if it were, the First Circuit should merely have struck the § 302 clause, and permitted petitioner to prove entitlement under the statute without it.

of ERISA.[11] The Court should grant certiorari to correct the First Circuit's misapplication of this Court's decision in *Mackey*.

V. The Court Should Grant The Writ Of Certiorari To Review The First Circuit's Erroneous Decision That Chapter 254 Is Not A Remedy Included In Rule 64 Of The Federal Rules Of Civil Procedure And Saved From Pre-emption By § 514(d) of ERISA.

While the First Circuit correctly concluded that Rule 64 of the Federal Rules of Civil Procedure is a federal law within the meaning of § 514(d) of ERISA, 29 U.S.C. § 1144(d), it erroneously held the lien provided by Massachusetts G.L. c. 254, § 4 was not the type of remedy provided by Rule 64 because it held Chapter 254 would abridge, enlarge or modify substantive rights in violation of the Rules Enabling Act, 28 U.S.C. § 2072(b) (App. A14-A15).[12] The First Circuit's deci-

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[11] If a general garnishment statute is not pre-empted and can be used by or against ERISA plans, as the Court concluded in *Mackey*, the addition of a reference that ERISA plans can use the statute like any other creditor should not trigger pre-emption, especially where ERISA plans were permitted to and did use the state law prior to the reference. *See Peters* v. *Hartford Accident and Indemnity Company*, 377 Mass. 863, 389 N.E. 2d 63, 66 (1979).

[12] The First Circuit's opinion leaves unanswered how respondent's substantive rights were affected where, like a garnishee, it is not required to pay anything out of its own pocket if it complies with the lien. G.L. c. 254, § 4 expressly provides that the lien is not created until notice has been given to the owner and that the amount of the lien cannot exceed the amount unpaid under the owner's contract with the general contractor at the time it receives notice. In other words, respondent's status is no different than the subject of the garnishment orders found not to be pre-empted by *Mackey*. Chapter 254 is a lien equivalent to the garnishment expressly permitted under Rule 64. Only if respondent ignores the lien will it be liable out of its own property. Thus even if Chapter 254 affects substantive rights, which is doubtful, it does so only incidentally. And Federal Rules of Civil Procedure which may incidentally affect a litigant's substantive rights do not violate the Rules Enabling Act if the rule is reasonably necessary to maintain the integrity of the system of rules. *Burlington Northern Railroad Co.* v. *Woods*, 480 U.S. 1, 5 (1986).

sion is contrary to decisions of this Court and would effectively mean that Rule 64 is invalidated by the Rules Enabling Act, for all state law creditor remedies create substantive remedies. The Court should grant certiorari to correct this deviation from this Court's precedents and to review this important issue of federal law.

Prior to filing this action, the Petitioner filed an action under ERISA and § 301(a) of the LMRA against the employer, S.N. Brown Electrical Corp., in the United States District Court for the District of Massachusetts, C.A. 90-11395Y. Petitioner also, pursuant to Rule 64 which permits use of liens "regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action," filed this action in state court to enforce a lien under Massachusetts G.L. c. 254.

Section 514(d) of ERISA provides that § 514(a) shall not "be construed to alter, amend, modify, invalidate, impair, or supercede any law of the United States." This Court has applied § 514(d) where "[s]tate laws obviously play a significant role in the enforcement" of the federal law. *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 101 (1983). This Court has ac knowledged the importance of the Federal Rules of Civil Procedure in providing ERISA plans with state law mechanisms for obtaining pre-judgment and post-judgment remedies. In *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 833-834 (1988), the Court stated:

> ERISA does not provide an enforcement mechanism for collecting judgments won in either of these two types of actions. Thus, while § 502(d), the "sue and be sued" provision, contemplates execution of judgments won against plans in civil actions, it does not provide mechanisms to do so. Moreover, Federal Rule of Civil Procedure 69(a), which would apply when either type of civil suit discussed above is brought against an ERISA plan in federal court, defers

> to state law to provide methods for collecting judgments. . . . Consequently, state-law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA. . . .

(Citations omitted). It follows that state law pre-judgment remedies under Rule 64 are equally as necessary as post judgment remedies under Rule 69(a). These remedies are essential to allow ERISA plans to lien property so that it will be available to satisfy judgments against employers for unpaid contributions.

The First Circuit's construction of the Rules Enabling Act, 28 U.S.C. § 2072, and Rule 64, to exclude state-law lien statutes which create or affect "substantive" rights against third parties would essentially abolish all prejudgment remedies. Arrest, sequestration, attachment and garnishment, all remedies expressly permitted by Rule 64, also create or affect "substantive" rights. Thus the First Circuit's reading would essentially render Rule 64 void under the Rules Enabling Act. Section 2072(b) of the Rules Enabling Act provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." The Court has construed this to mean that while the federal rules cannot create substantive rights, *Daily Income Fund* v. *Fox*, 464 U.S. 523, 544 n.2 (1984) (STEVENS, J., concurring in judgment), the federal rules may incorporate state laws which do create or affect substantive rights. *Kamen* v. *Kemper Financial Services, Inc.*, U.S. , 111 S.Ct. 1711, 1717 (1991). In fact, a unanimous Court in *Kamen* concluded that incorporation of state substantive law into Federal Rule 23.1 and federal common law may be necessary in order not to violate the Rules Enabling Act, suggesting that incorporation of state substantive law into the federal rule is necessary to comply with 28 U.S.C. § 2072(b).[13]

[13] The Court stated in *Kamen* that while Rule 23.1 contemplates that a shareholder make a pre-complaint demand upon the board of directors, it cannot

As stated by the Court:

> It is clear that the contours of the demand requirement in a derivative action founded on the ICA are governed by *federal* law. . . . It does not follow, however, that the content of such rule must be wholly the product of a federal court's own devising. Our cases indicate that a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards, . . . or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand,. . . . Otherwise, we have indicated that federal courts should "incorporat[e] [state law] as the federal rule of decision," unless "application of [the particular] state law [in question] would frustrate specific objectives of the federal programs." . . . The presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards. *See id.*, at 728-729, 739-740, 99 S.Ct. at 1458-1459, 1464-1465 (commercial law); *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204, 210, 66 S.Ct. 992, 995, 90 L.Ed. 1172 (1946) (property law). . . .

Id. at 1717. Thus not only is incorporation of state substantive law the "presumption" under the Federal Rules of Civil Pro-

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create a demand requirement because to do so would abridge, enlarge or modify a substantive right in violation of the Rules Enabling Act. *Id.* at 1716. Having said this, the Court nonetheless concluded that it would be proper to incorporate into Rule 23.1 as federal common law state substantive law concerning a futility exception to the pre-complaint demand requirement.

cedure, this Court has specifically noted that, with respect to Rule 64, it is not only the presumption but the very rule itself. *Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 436 n.10 (1974). There the Court recognized Rule 64 as the embodiment

> . . . of long-settled federal law providing that in all cases in federal court, whether or not removed from state court, state law is incorporated to determine the availability of prejudgment remedies for the seizure of person or property to secure satisfaction of the judgment ultimately entered. *Id.*

See also Huron Holding Corp. v. *Lincoln Mine Operating Co.*, 312 U.S. 183, 188 (1941) (applying New York law to test validity of attachment); *Kend* v. *Chroma-Glo, Inc.*, 51 F.R.D. 547, 549 (D. Minn. 1970), *aff'd*, 478 F.2d 198 (8th Cir. 1973) (stating that rule 64 embodies the holding of this Court's decision in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), in that it incorporates state pre-judgment creditor remedies for use by federal courts); *See generally* MOORE'S FEDERAL PRACTICE, par. 64.03 at p. 64-8 (1983) ("Rules 64 and 69 adopt, respectively, the former practice at law dealing with attachment, and other provisional remedies, and the execution of money judgments, but specifically provide that conformity to state law shall be to the law *existing at the time the remedy is sought*.").[14]

[14] It is for this reason that courts in considering whether application of a federal rule would violate § 2072(b) have not focused upon whether state substantive law can permissibly be incorporated, which they have taken for granted, but instead whether state law creates the right claimed. *See Fontenot* v. *Roach*, 120 F. Supp. 788, 790-791 (E.D. Tenn. 1954) (holding Rule 14 does not permit addition of third party defendant for right of contribution where Tennessee law has not created right of contribution until defendant has first satisfied the judgment); *Brennan* v. *Silvergate Dist. Lodge No. 50, Inter. Assoc. of Machinists and Aerospace Workers, AFL-CIO*, 503 F.2d 800, 804 (9th Cir. 1974) (in deciding right to intervention under Rule 24, which is a substantive right, court must first determine if intervention is contemplated by federal statute at issue).

The First Circuit deviated from this Court's precedents when it concluded that Rule 64 could not incorporate state laws which create substantive rights. Such a reading of the Rules Enabling Act is contrary to this Court's precedents which permit the Federal Rules of Civil Procedure to incorporate state substantive laws into the rules as federal common law. Furthermore, Rule 64 would be vitiated by denying use of state commercial and creditor statutes which create or affect substantive rights.[15]

The prohibition contained in § 2072(b) is only that the federal court cannot abridge, enlarge or modify a substantive right. It does not preclude the rule from recognizing or relying upon the state substantive law already in existence. In other words, Rule 64 can make use of state laws which create substantive rights if such substantive right is already recognized under state law at the time of the federal action. Rule 64 is a procedural means to permit use of state law remedies as "available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought. . . ." Thus only if the lien statute, arrest, sequestration or other corresponding or equiva-

[15] State law mechanisms such as arrest, attachment, garnishment, replevin, sequestration — mechanisms listed as available in Rule 64 — are generally considered to affect substantive rights. *See Fuentes* v. *Shevin*, 407 U.S. 67 (1972) (stating in replevin action that persons whose state law property "rights" are affected are entitled to notice and a hearing prior to seizure of the property); *Ospina* v. *Vanelli*, 34 F.R.D. 151, 152 (D. Minn. 1964) (stating that Rule 64 authorizes federal courts "to adopt both the substantive and procedural law of Minnesota in regard to garnishment proceedings.") The arrest and corresponding deprivation of liberty is clearly an abridgement of a fundamental substantive right. Garnishment orders to pay over property arguably creates a substantive right against another. If a bank, for example, ignores the garnishment order, it must still make payment of the monies from its own property. Furthermore, an attachment creates a lien, which in turn creates priorities among various lien claimants. Recognition of any lien has the potential of depriving some other person, including the judgment debtor, of a property right. State law prejudgment remedies are subject to procedural due process precisely because they affect substantive property or liberty rights of individuals.

lent remedy were not recognized under the state law in which the district court is held, and the district court nonetheless authorized the lien or garnishment of property or the arrest of a person, would the use of Rule 64 abridge, enlarge or modify a substantive right.

Rules 64 and 69(a) of the Federal Rules of Civil Procedure are unique among the Federal Rules of Civil Procedure, in that they specifically incorporate and make use of state creditor law, and thereby fill an important function by compensating for the general absence of pre-judgment and post-judgment remedies in federal statutes. This Court has already determined in *Mackey* that ERISA is just such a statute in which Congress chose not include pre-judgment and post-judgment remedies but to rely upon available state law remedies.

The First Circuit's conclusion that Rule 64 does not contemplate use of state laws which establish substantive rights is contrary to the express language of Rule 64. The effect of the First Circuit's holding is to declare Rule 64 invalid. The impairment of this federal law and the resulting effect of § 514(d) of ERISA is an important question of federal law which should be resolved by this Court.

Without this Court's review, the First Circuit's decision will leave ERISA plans with the ability to obtain judgments against employers but without the means other creditors have to secure and collect upon such judgments. This Court should, therefore, grant certiorari to restore to ERISA plans the ability to secure and collect on their judgments.

VI. The Pre-emption Of State Mechanics' Lien Statutes Undermines And Impairs Federal Labor And Pension Laws Which Have Long Depended On Mechanics' Liens, Bonding And Other State Statutes To Enforce The Collective Bargaining Obligations Of Employers, And Are Therefore Saved From Pre-emption By § 514(d) of ERISA.

Prior to the enactment of § 515 of ERISA, this Court had recognized that state law may be used under § 301(a) of the LMRA where compatible with the purpose of § 301(a). *See Textile Workers Union of America* v. *Lincoln Mills of Ala.*, 353 U.S. 448, 456-457 (1957). There the Court stated: "But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." Section 301(a) permits trustees of § 302(c) funds to sue to enforce collective bargaining agreements, to use state laws to collect contributions and to use state collection mechanisms. *See Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962); *Schneider Moving and Storage Company* v. *Robbins*, 466 U.S. 364 (1984).

When § 515 of ERISA was added to provide an additional enforcement mechanism, Congress specifically reserved other collection remedies under federal or state law. See Issue III, *supra*. Pre-emption of state mechanics' lien laws would impair enforcement of § 515 of ERISA and § 301(a) of the LMRA and undermine the purposes and protections Congress intended for ERISA plans when it enacted ERISA. As in *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983), given the importance of the state laws to the federal scheme, to make the federal remedies exclusive would so disrupt the enforcement scheme as to modify and impair federal law within the meaning of § 514(d).

The First Circuit's decision ignores the historical role state laws, and specifically state mechanics' lien laws, have had in the enforcement of § 515 of ERISA and § 301(a) of the LMRA.[16] Congressional statements that federal and state collection remedies be left undisturbed by ERISA, this Court's decisions under § 301(a) of the LMRA, and § 514(d) of ERISA prove that mechanics' lien laws are not to be pre-empted by ERISA. This Court should grant certiorari to restore the full use of § 515 and § 301(a) through state collection remedies as Congress intended.

CONCLUSION

For the foregoing reasons the petitioner requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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February 14, 1992

[16] Mechanics' lien law remedies have historically served to secure the payment of wages owed to laborers and mechanics engaged in the construction industry. Lien rights have existed in Massachusetts since its first law was enacted in 1819. *Friedman* v. *County of Hampden*, 204 Mass. 494, 90 N.E. 851, 855 (1910). "The earliest lien law was that of Maryland. Adopted in 1791 at the request of Thomas Jefferson and James Madison, it was designed to stimulate construction in Washington, D.C." *Bonds, Liens & Insurance*, Federal Publications, Inc., p. 79 (1986).

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APPENDIX A

United States Court of Appeals

For the First Circuit

No. 91-1318

JAMES L. McCOY, ADMINISTRATOR OF THE ELECTRICAL WORKERS TRUST FUNDS, ETC.,
Plaintiff, Appellant,

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Walter Jay Skinner, *U.S. District Judge*]

Before
Breyer, *Chief Judge*,
Aldrich and Selya, *Circuit Judges*.

Katherine A. Hesse, with whom *David W. Healey*, and *Murphy, Hesse, Toomey and Lehane* were on brief for appellant.

Corwin & Corwin, Lisa A. Harrod and *Joseph M. Corwin* on brief for David R. McGinness, Administrator for Trustees of Various Funds (Plumbers and Gasfitters Local Union No. 12), amicus curiae.

Bruce D. Burns, with whom *Jeffrey Swope, Harvey Nosowitz* and *Palmer & Dodge* were on brief for appellee.

November 19, 1991

SELYA, *Circuit Judge*. This appeal calls upon us to determine an issue of first impression: whether the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1988), preempts the operation of a Massachusetts mechanics' lien statute, Mass. Gen. L. ch. 254 (1990), as it concerns the rights of employee benefit plans. The district court dismissed the plaintiff's suit, finding preemption. *McCoy* v. *Massachusetts Institute of Technology*, 760 F. Supp. 12 (D. Mass. 1991). We affirm.

I. BACKGROUND

Because the district court's order of dismissal was entered pursuant to Fed. R. Civ. P. 12(b)(6), we must accept as true the well-pleaded factual averments contained in the complaint, while at the same time drawing all reasonable inferences therefrom in the appellant's favor. See *Correa-Martinez* v. *Arrillaga-Belendez*, 903 F.2d 49, 51 (1st Cir. 1990); *Dartmouth Review* v. *Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989).

The salient facts are susceptible to succinct summarization. Plaintiff-appellant James L. McCoy is the administrator of several different trust funds (the Funds) set up by Local 103 of the International Brotherhood of Electrical Workers. The Funds, through McCoy, brought suit in state court to enforce a lien against property owned by the defendant Massachusetts Institute of Technology (MIT). Neither the Funds nor the union had any direct relationship with MIT. Rather, the Funds premised their action on a Massachusetts law allowing the trustee of an employee benefit plan to assert a lien against property improved through the labor of plan participants in order to collect overdue benefit contributions.

The Funds alleged, in particular, that S.N. Brown Electrical Corporation (Brown) was the employer of some plan participants; that Brown, as a subcontractor, employed these persons to effect improvements to property owned by MIT and located

at 143-153 Albany Street, Cambridge, Massachusetts; that Brown, in derogation of its obligations under a collective bargaining agreement, neglected to make employee benefit contributions attributable to the work; and that the Funds were, therefore, entitled to look to MIT's interest in the Albany Street property as a means of recouping the resultant shortfall.

Invoking 28 U.S.C. § 1441 (1988), MIT removed the case to the district court based on federal question jurisdiction.[1] MIT then moved to dismiss, claiming preemption. The district court agreed, *McCoy*, 760 F. Supp. at 14-16, and this appeal ensued.

II. STANDARD OF REVIEW

We afford plenary review to orders of the district court granting motions to dismiss under Civil Rule 12(b)(6). *See Miranda* v. *Ponce Fed. Bank*, F.2d , (1st Cir. 1991) [No. 90-2214, slip op. at 3]; *Kale* v. *Combined Ins. Co.*, 924 F.2d 1161, 1165 (1st Cir.), *cert. denied*, S. Ct. (1991). The same benchmarks apply in the exercise of appellate jurisdiction as in the nisi prius court. It follows that, "[i]n the Rule 12(b)(6) milieu, an appellate court . . . may affirm a dismissal for failure to state a claim only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez*, 903 F.2d at 52.

[1] The well-pleaded complaint rule normally prohibits the invocation of federal question jurisdiction if no issue of federal law appears on the face of a complaint. *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 113 (1936); *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908). Because federal preemption is ordinarily raised as a defense to a suit, it will often not appear on the face of a well-pleaded complaint and, accordingly, the possibility of preemption does not usually authorize removal. *See Metropolitan Life Ins. Co* v. *Taylor*, 481 U.S. 58, 63 (1987). But the rule, like most legal rules, is not without its recognized exceptions. A claim of ERISA preemption animates one such exception, *id.* at 67, on the basis that "Congress may so completely pre-empt a particular area [of law] that any civil complaint raising this select group of claims is necessarily federal in character." *Id.* at 63-64. Hence, the court below properly asserted removal jurisdiction despite the fact that the complaint did not explicitly delineate a federal question.

III. THE STATE STATUTE

To place the issues on appeal into perspective, it is necessary first to give the reader a glimpse of the Massachusetts mechanics' lien law. The central provision of the lien law states:

> A person to whom a debt is due for personal labor performed in the erection, alteration, repair or removal of a building or structure upon land, by virtue of an agreement with, or by consent of, the owner of such building or structure, or of a person having authority from or rightfully acting for such owner in procuring or furnishing such labor, shall, under the provisions of this chapter, other than sections three and four, have a lien upon such building or structure and upon the interest of the owner thereof in the lot of land upon which it is situated, for not more than eighteen days' work actually performed during the forty days next prior to his filing a statement as provided in section eight.
>
> For purposes of this chapter, a person shall include any employee of any employer and the trustee or trustees of any fund or funds, established pursuant to section 302 of the Taft Hartley Law (29 USC 186), providing coverage or benefits to said person. The trustee or trustees of any such fund or funds shall have all the liens under this chapter that any person has. The trustee or trustees shall also have the right to enforce said liens pursuant to this chapter.

Mass. Gen. L. ch. 254, § 1. The statute provides for notices referable to liens, *see, e.g., id.* §§ 2-4, and specifically contemplates that, where subcontractors are involved, certain lien notices "may also be filed by the trustee or trustees of a fund

or funds, described in section one, providing coverage or benefits to any person performing labor under a written contract with a contractor, or with a subcontractor of such contractor." *Id.* § 4. In succeeding sections, the lien law limns the mechanics of enforcement. Generally, a lien is enforced by means of a civil action brought by the lienor against the property owner in the county or judicial district where the property lies. *Id.* § 5.

The remaining provisions of the lien law are not germane to our discussion.

IV. ANALYSIS

We elect to divide our perlustration of the merits into three segments. Initially, we review the general principles and policies pertaining to preemption in the ERISA context. We then address the chief argument advanced in support of reversal. Finally, we comment upon certain secondary theses hawked by the Funds.

A. *ERISA Preemption: An Overview.*

Out of respect for the distinct spheres of authority inherent in our federal system, preemption of state law is generally disfavored. *See, e.g., Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). But, this presumption is not inviolable. If "the nature of the regulated subject matter permits no other conclusion, or . . . Congress has unmistakably so ordained," federal preemption of state law is mandated under the Supremacy Clause. *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963).

ERISA preemption is, as a general matter, extensive in its scope. ERISA governs "employee benefit plans." 29 U.S.C. § 1001. As part of the statutory structure established to regulate such plans, Congress formulated a sweeping preemption clause. This clause, ERISA § 514(a) commands that ERISA "shall supersede any and all State laws insofar as they may now

or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). For preemption purposes, "State laws" are "all laws, decisions, rules, regulations, or other State action having the effect of law." 29 U.S.C. § 1144(c)(1).

Under the provisions of section 514(a), if a state law "relates to" an employee benefit plan, it is preempted. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). "[A] state law may 'relate to' a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Ingersoll-Rand Co.* v. *McClendon*, 111 S. Ct. 478, 483 (1990); *see also Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 47-48 (1987); *Shaw*, 463 U.S. at 98.

At the bottom line "the question whether a certain state action is pre-empted by federal law is one of congressional intent." *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 208 (1985); *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978). While fathoming congressional intent can sometimes be an imprecise venture, section 514(a)'s bold and capacious language provides a particularly incisive manifestation of congressional purpose, thus easing the judicial chore. *See Ingersoll-Rand*, 111 S. Ct. at 482 ("Where, as here, Congress has expressly included a broadly worded pre-emption provision in a comprehensive statute such as ERISA, our task of discerning congressional intent is considerably simplified."); *Shaw*, 463 U.S. at 96 (similar).

In considering Congress' intent in the ERISA context, all roads lead to Rome. The legislative history of section 514(a), like its language, counsels against a crabbed interpretation of the statute. As the *Shaw* Court observed, the bill that became ERISA originally contained a much narrower preemption clause that Congress rewrote more panoramically, indicating "that the section's pre-emptive scope was as broad as its language."

Shaw, 463 U.S. at 98. Senator Williams, a principal sponsor of the bill, stated that the ERISA preemption cause, in its final form, was "intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." 120 Cong. Rec. 29,933 (1974).

Exhibiting great deference to the statutory language and legislative history, the Court has consistently acknowledged the far-ranging scope of section 514(a)'s phraseology and interpreted section 514(a) expansively. *See, e.g., Ingersoll-Rand*, 111 S.Ct. at 482; *Pilot Life*, 481 U.S. at 44-47; *Shaw*, 463 U.S. at 96-100; *see also FMC Corp.* v. *Holliday*, 111 S. Ct. 403, 407 (1990) (observing that "[ERISA's] pre-emption cause is conspicuous for its breadth"); *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983) (describing ERISA's commodious preemption provision as "virtually unique").

Despite the fact that section 514(a) casts a long shadow, ERISA preemption is not limitless. "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21; *see also Retirement Fund Trust, Etc.* v. *Franchise Tax Bd.*, 909 F.2d 1266, 1281 (9th Cir. 1990) (ERISA held not to preempt a state income tax levy); *Aetna Life Ins. Co.* v. *Borges*, 869 F.2d 142, 147 (2d Cir.) (ERISA held not to preempt a state escheat law), *cert. denied*, 110 S. Ct. 57 (1989); *Firestone Tire & Rubber Co.* v. *Neusser*, 810 F.2d 550, 556 (6th Cir. 1987) (ERISA held not to preempt a municipal income tax of general applicability); *Rebaldo* v. *Cuomo*, 749 F.2d 133, 139 (2d Cir. 1984) (ERISA held not to preempt a state law regulating hospital fees), *cert. denied*, 472 U.S. 1008 (1985). By the same token, ERISA does not preempt state judgment-enforcing laws of general application. Thus, in *Mackey* v. *Lanier Collection*

Agency & Serv., Inc., 486 U.S. 825 (1988), a state's general garnishment statute evaded preemption even when used to satisfy judgments against ERISA plan participants. *See id.* at 841.

We do not pretend that it is always easy to draw the line separating those state statutes that fall prey to ERISA preemption from those that stand fast. But, to the extent that gray areas exist, the policy rationales that permeate ERISA and its preemption can afford sound guidance in determining what state laws may survive. *See Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 15 (1987). The drafters of section 514(a) wished, among other things, to protect the rights and expectations of plan participants, *Ingersoll-Rand*, 111 S. Ct. at 482, and

> to ensure that plans and plan sponsors would be subject to a uniform body of benefit law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries.

Id. at 484. Indeed, the Court has often justified section 514(a)'s elongated reach by citing Congress' desire to avoid a "patchwork scheme of regulation [which] would introduce considerable inefficiencies in benefit program operation." *Fort Halifax*, 482 U.S. at 11; *see also FMC*, 111 S. Ct. at 408-09; *Shaw*, 463 U.S. at 105.

B. *ERISA Preemption: The Doctrine As Applied.*

Based on the policy considerations described above, the Funds have a plausible argument that the mechanics' lien law here at issue should not succumb to section 514(a). After all, the Massachusetts statute grants employee benefit plans access

not only to a further mechanism by which they can collect outstanding debts, but also to a new (and perhaps deeper) pocket from which monies owed may be repaid. Improving a fund's collection prospects seems, at first blush, fully consonant with Congress' purpose of safeguarding participants' rights and expectations. Furthermore, the lien law advantages employee benefit plans without increasing "the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government" — a factor which "could work to the detriment of plan beneficiaries." *Ingersoll-Rand*, 111 S. Ct. at 484. And, it is hard to see how use of Mass. Gen. L. ch. 254 might interfere with establishing "a uniform body of benefit law," *id.*, to any greater degree than would use of a state garnishment statute (as permitted in *Mackey*). In this sense, then, allowing trustees of covered plans to utilize the lien law at their own volition would simply add an arrow to an already well-stocked quiver. Coming at the same point from another direction, if the trustees of an ERISA regulated plan choose to impose and enforce a lien, it is fair to presume that, as fiduciaries, they will use the proceeds to the betterment of plan beneficiaries. So viewed, the lien law is a help, not a hindrance, to ERISA-regulated plans.

But, benefit is not the relevant test. Notwithstanding the synchronicity between the policy considerations that undergird ERISA and the Funds' attempted utilization of the Massachusetts mechanics' lien law, fidelity to precedent compels a conclusion that any such use of the lien law is preempted. We explain briefly.

The Court has been especially skeptical of state laws which, like the Massachusetts lien law, specifically refer to ERISA plans and grant them special treatment. *See Mackey*, 486 U.S. at 829 (stating that the Court has "virtually taken it for granted that state laws which are specifically designed to affect employee benefit plans are pre-empted under 514(a)") (quotation

marks omitted). The vice in such laws is not palliated by a state legislature's good intentions or by a comfortable fit between a state statute and ERISA's overall aims. To the exact contrary, the Court has made it pellucidly clear that section 514(a) "was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements." *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985); *accord Mackey*, 486 U.S. at 830. Hence, "*any* state law which singles out ERISA plans, by express reference; for special treatment is pre-empted." *Id.* at 838 n.12 (emphasis in original). This means, in short, that state laws which expressly relate to employee benefit plans are necessarily grist for the preemption mill.

To be sure, footnote 12 in *Mackey* is dictum — but it is considered dictum. We are, therefore, both unable to ignore it and unwilling to do so. We agree with Professor Wright that, in evaluating dicta, "[m]uch depends on the character of the dictum. Mere obiter may be entitled to little weight, while a carefully considered statement . . ., though technically dictum, must carry great weight, and may even . . . be regarded as conclusive." Charles A. Wright, *The Law of Federal Courts* § 58, at 374 (4th ed. 1983). And here, the earmarks of careful consideration are readily apparent. In our judgment, it would be blinking reality to pass off *Mackey's* footnote 12 as a chance statement. Justice White's emphasizing of the word "*any*" by placing it in italics eliminates even the remote possibility that footnote 12 was casually constructed.

This conclusion draws the grease from the goose. We think that federal appellate courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when, as here, a dictum is of recent vintage and not enfeebled by any subsequent statement. *Cf.*, *e.g.*, *Faucher* v. *Federal Election Comm'n*, 928 F.2d 468,

470 (1st Cir.) (court of appeals cannot assume the Supreme Court "proclaims the law lightly" when it authors considered dictum), *cert. denied*, S. Ct. (1991). If lower courts felt free to limit Supreme Court opinions precisely to the facts of each case, then our system of jurisprudence would be in shambles, with litigants, lawyers, and legislatures left to grope aimlessly for some semblance of reliable guidance. Nor are we alone in voicing our healthy regard for dictum that appears to have been carefully considered. *See, e.g., Nichol* v. *Pullman Standard, Inc.*, 889 F.2d 115, 120 n.8 (7th Cir. 1989) (court of appeals "should respect considered Supreme Court dicta"); *United States* v. *Underwood*, 717 F.2d 482, 486 (9th Cir. 1983) (court of appeals not at liberty to "disregard . . . guidelines" established by Supreme Court, albeit through dicta), *cert. denied*, 465 U.S. 1036 (1984); *United States* v. *Bell*, 524 F.2d 202, 206 (2d Cir. 1975) (considered dictum "must be given considerable weight and can not be ignored in the resolution of [a] close question").

If we are to turn corners squarely, the rest follows inexorably. In respect to the scope of ERISA preemption, we have no real option except to conclude that the High Court meant exactly what it wrote in footnote 12 of *Mackey*. Therefore, we are constrained to treat the statement as authoritative and to obey its command.

Given this preface, there can be no question about the closing chapter. The statute at issue expressly singles out ERISA plans for special treatment. The second paragraph of Mass. Gen. L. ch. 254, § 1 provides, *inter alia*, that the mechanics' lien law shall inure to the advantage of "the trustee or trustees of any fund or funds, established pursuant to section 302 of the Taft Hartley Law (29 USC 186), providing coverage or benefits to [an employee]." Similarly, the law provides for the filing of certain lien-related notices "by the trustee or trustees of a fund or funds, described in section one, providing coverage or bene-

fits to any person performing labor." *Id.* § 4. Under ERISA's staple definitions, the term "employee benefit plan" (or simply "plan") includes "employee welfare benefit plan[s]." 29 U.S.C. § 1002(3). A plan fits within this integument if it is established, *inter alia*, "for the purpose of providing for its participants or their beneficiaries . . . any benefit described in [29 U.S.C. § 186(c)]." *Id.* § 1002(1)(B). Thus, any plan that grants benefits under 29 U.S.C. § 186, which is another way of describing any plan that grants benefits under section 302 of the Taft-Hartley Act, is by definition an ERISA plan.[2] Put bluntly, by singling out "section 302" plans for special treatment, the Massachusetts mechanics' lien law, in the same stroke, singles out ERISA plans for special treatment. It is, therefore, preempted as it applies to ERISA-regulated plans.

In light of this analysis, we find it unsurprising that, in analogous cases, several of our sister circuits have ruled in favor of preemption. The Fifth Circuit, in a strikingly similar case involving Louisiana's mechanics' lien statute, La. Rev. Stat. Ann. §§ 9:4801-9:4823 (West 1983), held that ERISA preempted the law's operation. *See Iron Workers Mid-South Pension Fund* v. *Terotechnology Corp.*, 891 F.2d 548, 556 (5th Cir.), *cert. denied*, 110 S. Ct. 3272 (1990). The Third Circuit found preemption in a case involving Pennsylvania's wage payment and collection law, Pa. Stat. Ann. tit. 43, §§ 260.1-260.12 (Supp. 1985). *See McMahon* v. *McDowell*, 794 F.2d 100, 105-08 (3d Cir.), *cert. denied*, 479 U.S. 971 (1986).

[2] We note in passing that, although there is no legitimate doubt as to what the state legislature intended when it wrote the words "established pursuant to section 302 of the Taft Hartley Law (29 USC 186)," the statute seems inartfully phrased. Section 302 is not a provision "pursuant to" which a fund can be established. Rather, section 302 regulates financial transactions between employers and employees (or unions). *See* 29 U.S.C. § 186(a)-(b) (1988). In the course of such regulation, section 302 describes certain employee benefits. *Id.* § 186(c). It is these employee benefits that both the Massachusetts law, Mass. Gen. L. Ch. 254, §§ 1, 4, and ERISA, 29 U.S.C. § 1002(1)(B), incorporate by reference.

The Ninth Circuit recently decided that a California lien law which advantaged trusts established to receive employer's contributions "on account of fringe benefits supplemental to a wage agreement," Cal. Civ. Code § 3111 (West 1974), was preempted by ERISA. *See Sturgis* v. *Herman Miller, Inc.*, F.2d , (9th Cir. 1991) [No. 90-15054, slip op. at 12286-89]. The court remarked that, while the California law did not expressly refer to ERISA plans, "it need not do so where the statute obviously singles out ERISA plans." *Id.* at [slip op. at 12289]. Since the state law accorded "ERISA plans a unique procedural benefit by conferring upon them special mechanic lien rights to collect delinquent contributions," it was preempted. *Id.* Given the difference in language between the Massachusetts and California statutes — a difference which tilts toward preemption, not away from it — the same result must obtain here.[3]

We need not paint the lily. State statutes which expressly grant preferential benefits to ERISA plans cannot withstand the preemptive force of ERISA § 514(a). Inasmuch as Mass. Gen. L. ch. 254 is such a statute, the Funds' use of the lien created thereby is preempted.

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[3] As the appellant accurately observes, state appellate courts have, on occasion, espoused a seemingly contrary view. *See, e.g., Plumbers Local 458 Holiday Vacation Fund* v. *Howard Immel, Inc.*, 445 N.W.2d 43 (Wis. 1989) (declining to find Wisconsin lien law preempted). The better-reasoned state court decisions, however, are harmonious with the federal precedents. *See, e.g., Carpenters S. Cal. Admin. Corp.* v. *El Capitan Dev. Co.*, 811 P.2d 296 (Cal. 1991) (en banc), *petition for cert. filed* (U.S. Sept. 18, 1991) (No. 91-480); *Prestridge* v. *Shinault*, 552 So.2d 643 (La. Ct. App. 1989), *writ denied*, 559 So.2d 131 (La. 1990). A decision of the New York Court of Appeals, *Sasso* v. *Vachris*, 484 N.E.2d 1359 (N.Y. 1985), much ballyhooed by the Funds, antedates *Mackey* and *Ingersoll-Rand*, and its reasoning, which has been called into question by at least one other circuit court, *see Local Union 598, Plumbers & Pipefitters Industry Journeymen & Apprentices Training Fund* v. *J.A. Jones Constr. Co.*, 846 F.2d 1213, 1219 n.8 (9th Cir.), *aff'd mem.*, 488 U.S. 881 (1988), is suspect. At any rate, *Sasso* involves a significantly different statutory scheme and is largely inapposite for our purposes.

C. *Other Arguments.*

The Funds make two other attempts to avoid a preemptive strike. Neither effort brings them out of range.

1. Rule 64. The Funds asseverate that the use of the Massachusetts mechanics' lien law is authorized by Fed. R. Civ. P. 64[4] and, therefore, is salvaged from preemption by section 514(d) of ERISA, 29 U.S.C. 1144(d), which provides that ERISA shall not "be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." The asseveration cannot survive the mildest of scrutiny.

In order to trigger section 514(d), some alteration of a federal law must be in prospect. The Federal Rules of Civil Procedure can properly be regarded as coming under this rubric since they have the same force and effect as federal statutory law. *See United States* v. *St. Paul Mercury Ins. Co.*, 361 F.2d 838, 839 (5th Cir.), *cert. denied*, 385 U.S. 971 (1966); *Laker Airways Ltd.* v. *Pan Am. World Airways*, 103 F.R.D. 42, 50 n.19 (D.D.C. 1984). Nevertheless, the Civil Rules cannot roam at will. The Rules Enabling Act, 28 U.S.C. § 2072 (1988), ordains that the Civil Rules must relate to "practice or procedure." *Id.* § 2072(a); *see also Answering Serv. Inc.* v.

[4] The rule provides in pertinent part that, during the course of an action in federal court,

> all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to [certain qualifications not germane to the case at hand]. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Fed. R. Civ. P. 64.

Egan, 728 F.2d 1500, 1506 (D.C. Cir. 1984). The Enabling Act expressly forbids Civil Rules that "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see also Brown* v. *E.W. Bliss Co.*, 818 F.2d 1405, 1409 (8th Cir. 1987).

The Funds say, in essence, that the marriage of Civil Rule 64 and ERISA § 514(d) permits employee benefit plans to take advantage of the Massachusetts mechanics' lien law. If this argument were correct, the upshot would be to give birth to a new, independent cause of action, not otherwise suable. Such a result would obviously affect substantive rights and thus alter substantive law. And the result would, in the bargain, contravene the Rules Enabling Act. In this respect, the mechanics' lien law, which creates a new right of action against a new defendant, is unlike most remedies contemplated by Rule 64 "because it is not a remedy against [a] judgment debtor or against a person who is personally indebted to, or in possession of the property of, the judgment debtor." *Bricklayers Fringe Benefit Funds* v. *North Perry Baptist Church*, 590 F.2d 207, 209 (6th Cir.) (affirming dismissal of a mechanics' lien foreclosure claim asserted pursuant to Rule 64 against property owners for fringe benefit contributions owed by a contractor), *cert. denied*, 444 U.S. 834 (1979).

In sum, the Rules Enabling Act forecloses the Funds' argument. Civil Rule 64 cannot be employed as an effective vehicle to remove the Massachusetts mechanics' lien law from preemption under the terms of 29 U.S.C. § 1144(d).

2. The Education and Cultural Fund. The Funds' fallback position is that, even if we find preemption, the Electrical Workers Educational and Cultural Fund (E&C Fund), one of the funds for whose benefit McCoy sues, can still avail itself of the rights created by chapter 254. This claim rests on the assertion that the E&C Fund is not an employee welfare benefit plan covered by ERISA. In this regard, the Funds contend that not all plans which provide for benefits under 29 U.S.C. § 186

are ERISA plans. As support for this allegation, they note that the Secretary of Labor has authority to issue regulations defining certain terms in the ERISA statute, *see* 29 U.S.C. § 1135; and that, utilizing this power, the Secretary promulgated a regulation, 29 C.F.R. § 2510.3-1(a) (1990), that fails to include plans granting benefits under 29 U.S.C. § 186(c)(9) within its ambit.[5] On this basis, the Funds try to convince us that the regulation's silence effectively excludes section 186(c)(9) plans, like the E&C Fund, from ERISA coverage. The contention is not only unpersuasive but also procedurally defaulted.

It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal. *See, e.g., Boston Celtics Ltd. Partnership* v. *Shaw*, 908 F.2d 1041, 1045 (1st Cir. 1990); *Aoude* v. *Mobil Oil Corp.*, 862 F.2d 890, 896 (1st Cir. 1988); *Clauson* v. *Smith*, 823 F.2d 660, 666 (1st Cir. 1987). In the lower court, the Funds' opposition to MIT's motion to dismiss made passing mention of the general point — a mention which, in its entirety, comprised two sentences and one citation (to a tangentially relevant case).[6]

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[5] Section 186(c)(9) addresses benefits granted "with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978." 29 U.S.C. § 186(c)(9). Section 5(b) of the Labor Management Cooperation Act contemplates, as its title implies, improving cooperation and communication between labor and management.

[6] The Funds' total argument to the district court on this subject consisted of the following:

> Section 514(a() of ERISA by its terms applies only to employee benefit plans covered by ERISA as defined by § 4(a). . . . Therefore Chapter 254 is not preempted with respect to the Electrical Workers Education and Cultural Fund, Local 103 I.B.E.W., which is not covered by ERISA.

The only case cited, *Massachusetts* v. *Morash*, 490 U.S. 107 (1989), which appeared in the opposition where we have inserted an ellipsis, was so peripheral that the Funds do not cite it at all on their briefs on appeal.

The Funds failed to provide any analysis of the statutory scheme, to present any legal authority directly supporting their thesis; or to give any reason why the E&C Fund was not an employee benefit plan within ERISA's contemplation. They did not refer the court to either 29 U.S.C. § 186(c)(9) or 29 C.F.R § 2510.3-1(a). In short, when this claim was presented below, it was the merest of skeletons.

In an analogous situation, we wrote that a party has a duty "to spell out its arguments squarely and distinctly. . . . [rather than being] allowed to defeat the system by seeding the record with mysterious references . . . hoping to set the stage for an ambush should the ensuing ruling fail to suit." *Paterson-Leitch Co.* v. *Massachusetts Mun. Wholesale Elec. Co.*, 840 F.2d 985, 990 (1st Cir. 1988); *see also Kensington Rock Island Ltd. Partnership* v. *American Eagle Historic Partners*, 921 F.2d 122, 124-25 (7th Cir. 990) ("Arguments raised in the District Court in a perfunctory and underdeveloped . . . manner are waived on appeal.") (quotation marks omitted); *Beaudett* v. *City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985) (appellate-courts should not permit "fleeting references to preserve questions on appeal"), *cert. denied*, 475 U.S. 1088 (1986). Overburdened trial judges cannot be expected to be mind readers. If claims are merely insinuated rather than actually articulated in the trial court, we will ordinarily refuse to deem them preserved for appellate review. So here. We reject as procedurally defaulted, the E&C Fund's belated effort to give substance to its hitherto undeveloped theory.[7]

[7]The Funds maintain that they presented the district court with a properly propaedeutic version of their argument regarding the E&C Fund in their opposition to MIT's request for a protective order. But, that pleading, which was submitted nearly two months after briefing on MIT's motion to dismiss was completed, cannot resurrect the issue for appeal. Courts are entitled to expect represented parties to incorporate all relevant arguments in the papers that directly address a pending motion. *See, e.g., Weinberger* v. *Great N. Nekoosa Corp.*, 925 F.2d 518, 528 (1st Cir. 1991) ("Requests for hearing must be explicit and

We likewise reject the Funds' blithe suggestion that a party's duty of clear articulation is somehow abated in the Rule 12(b)(6) context. In opposing a Rule 12(b)(6) motion, a plaintiff cannot expect a trial court to do his homework for him. Rather, the plaintiff has an affirmative responsibility to put his best foot forward in an effort to present some legal theory that will support his claim. *See Correa-Martinez*, 903 F.2d at 52; *Dartmouth Review*, 889 F.2d at 16; *Ryan* v. *Scoggin*, 245 F.2d 54, 57 (10th Cir. 1957) (a court pondering a Rule 12(b)(6) motion should not grant credence to a "footless conclusion of law"). In this instance, the Funds disregarded that obligation. No amount of interpretive liberality can save chestnuts so poorly protected from the hot fire of dismissal.

A second reason to forswear the E&C Fund's claim hinges on the legal merit of its argument (or, more exactly put, the lack of legal merit). The complaint states that all the plans were "established pursuant to the requirements of 29 U.S.C. 186."[8] The plans are, therefore, employee welfare benefit plans within ERISA's purview. *See supra* p.14; *see also* 29 U.S.C. § 1002. At bottom, then, the E&C Fund's status argument runs at cross purposes with the plain language of the statute.

The argument is, moreover, little bolstered by the adscititious items which the appellant brings to bear. The Funds' re-

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should be embodied in the pleadings, not in correspondence which may never reach . . . the judge's attention."); *see also* D. Mass. R. 7.1(a)(2) (requiring opposition to motion to contain "in the same (rather than a separate), document a memorandum of reasons, including citation of supporting authorities, why the motion should not be granted"); Rule 7.1(a)(3) (prohibiting supplementation of opposition except "with leave of court"); Rule 7.1(e) (providing that, when oral argument has not been requested, motions "will be decided on the papers submitted [once] an opposition to the motion has been filed"). Hence, the district court was under no obligation to rummage through later-filed items pertaining to other matters in an attempt to vitalize the anemic argument contained in the Funds' opposition to MIT's dismissal motion.

[8] This language is inapt. *See supra* note 2.

liance on 29 C.F.R. § 2510.3-1(a), for instance, is mislaid. The regulation was promulgated in 1975. 29 U.S.C. § 186(c)(9), the statutory reference which the appellant contends was purposefully excluded from the regulation's text, was not enacted until 1978. Thus, it is virtually meaningless that the regulation fails to list within its compendium of ERISA plans those which grant benefits described in a portion of the statute that was not yet enacted when the regulation itself was written. The Funds' reliance on two advisory opinions of the United States Department of Labor (DOL), *ERISA Adv. Op. 91-08A* (Jan. 30, 1991) and *ERISA Adv. Op. 84-40A* (Oct. 26, 984), is equally unprofitable. These opinions did not involve either MIT or the Funds and, therefore, have no force as precedent here. After all, the DOL's regulations specifically provide that "[o]nly the parties described in the request for opinion may rely on the opinion." 41 Fed. Reg. 36,281, 36,283 (§ 10).

To sum up, since the E&C Fund was established pursuant to 29 U.S.C. § 186, and since ERISA states plainly that all plans granting benefits enumerated in section 186 are ERISA-regulated employee welfare benefit plans, the E&C Fund is subject to ERISA preemption on the same basis as the other six funds involved in this litigation. There is no set of facts potentially provable by the appellant which, under the complaint as framed, could change this outcome.

V. CONCLUSION

We need go no further.[9] The Funds' proposed use of the Massachusetts mechanics' lien law, Mass. Gen. L. ch. 254, is

[9] To the extent that the amicus raises different grounds in support of reversal, we decline to consider those grounds. While amici are allowed to participate in appellate proceedings to help the reviewing court attain a just result, "[w]e know of no authority which allows an amicus to interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore." *Lane* v. *First Nat'l Bank*, 871 F.2d 166, 175 (1st Cir. 1989).

thwarted by operation of ERISA § 514(a), 29 U.S.C. § 1144(a). The suit was properly dismissed on preemption grounds.

Affirmed. Costs to appellee.

APPENDIX B

United States Court of Appeals

For the First Circuit

No. 91-1318

JAMES L. McCOY, ADMINISTRATOR OF THE ELECTRICAL WORKERS TRUST FUNDS, LOCAL 103 I.B.E.W.,
Plaintiff, Appellant,

v.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY,
Defendant, Appellee.

JUDGMENT

Entered: November 19, 1991

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

Costs to appellee.

By the Court:

/s/ Francis P. Scigliano
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JAMES L. McCOY, ADMINISTRATOR
OF THE ELECTRICAL WORKERS TRUST
FUNDS, LOCAL 103 I.B.E.W.
Plaintiff

v.

MASSACHUSETTS INSTITUTE
OF TECHNOLOGY
Defendant

CIVIL ACTION
No. 90-11925-S

MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION TO REMAND AND DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

March 1, 1991

SKINNER, D.J.

This is an action brought by the plaintiff, James McCoy Administrator of the Electrical Workers Trust Funds ("the Funds"), Local 103 I.B.E.W., to enforce a lien against property owned by the defendant Massachusetts Institute of Technology ("MIT"). The complaint was filed pursuant to M.G.L c. 254 in the Middlesex Superior Court. The defendant removed the case to this court on the grounds that the Administrator's state law action is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*. The plaintiff now moves to remand the action back to the Superior Court on the grounds that this court lacks subject matter jurisdiction over the state lien claim. MIT moves to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) because the plaintiff's state law claim is preempted by ERISA.

Background

Plaintiff is the Administrator of various funds established pursuant to the requirements of 29 U.S.C. § 186 (Complaint, ¶¶ 1,2). Participants of the Funds were employed by S.N. Brown Electrical Corporation ("Brown"), a subcontractor, in the "erection, alteration, repair, or removal of the building" located at 143-153 Albany Street, Cambridge, Massachusetts. (¶ 4) Defendant MIT is the owner of this property. (¶ 3) The Administrator contends that Brown was an employer obligated to make contributions to the Funds under a collective bargaining agreement. The Funds are owed over $30,000 in unpaid employee benefit plan contributions. (¶ 7) After complying with all the procedural requirements of M.G.L. c. 254 to obtain a lien on the Albany Street property, on July 17, 1990, the Administrator filed a complaint to foreclose on the lien in the Middlesex Superior Court. (¶¶ 5, 6, 7, 8, 9, 11)

Discussion

The plaintiff asserts that this action should be remanded on the grounds that M.G.L. c. 254 is not preempted by ERISA and this court lacks subject matter jurisdiction to adjudicate the Administrator's lien claim under chapter 254. The complaint makes no mention of ERISA or any other federal statute. The usual rule is that a cause of action arises under federal law for purposes of 28 U.S.C. § 1331 only when the plaintiff's well-pleaded complaint raises an issue of federal law. *See Gully* v. *First National Bank*, 299 U.S. 109 (1936); *Louisville & Nashville R. Co.* v. *Mottley*, 211 U.S. 149 (1908). Federal preemption is normally a federal defense to the plaintiff's suit. As a defense, therefore, it does not appear on the face of a well-pleaded complaint, and does not authorize removal to federal court. *Metropolitan Life Insurance Company* v. *Taylor*, 481 U.S. 58, 63 (1987). The United States Supreme Court has noted, however, that "Congress may so completely pre-empt a

particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life*, 481 U.S. at 63-64 (holding that common law contract and tort claims that are preempted by ERISA are removable to federal court). Under the reasoning of *Metropolitan Life*, if ERISA preempts the Administrator's state lien claim, then this court has subject matter jurisdiction over this action even though the complaint on its face states no federal cause of action.

The issue I must decide in order to decide both the motion to remand and the motion to dismiss is whether M.G.L. c. 254 is preempted by ERISA. M.G.L. c. 254, § 1 reads:

> A person to whom a debt is due for personal labor performed in the erection, alteration, repair or removal of a building or structure upon land . . . shall . . . have a lien upon such building or structure and upon the interest of the owner thereof in the lot of land upon which it is situated. . . .
>
> For purposes of this chapter, a person shall include any employee of any employer and the trustee or trustees of any fund or funds, established pursuant to section 302 of the Taft Hartley Law (29 USC 186), providing coverage or benefits to such person. The trustee or trustees of any such fund or funds shall have all the liens under this chapter that any person has. The trustee or trustees shall also have the right to enforce said liens pursuant to this chapter.

Under 29 U.S.C. § 1144(a), ERISA "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan. . . ." (Emphasis added.) An exception to the preemption provision is made for state laws regulating insurance, banking, or securities. § 1144(b)(2). Chapter 254 is not such a statute.

The Supreme Court has referred repeatedly to "the expansive sweep of the preemption clause." *Pilot Life Insurance Company* v. *Dedeaux*, 481 U.S. 41, 47 (1987). The Court has stated that the phrase "relate to" should be given its broad common sense meaning, such that a state law "relates to" an employee benefit plan if it has a connection with or reference to such a plan. *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). Chapter 254 clearly "relates to" employee benefit plans and is, therefore, expressly preempted by 29 U.S.C. § 1144(a).

The plaintiff argues that chapter 254 is not preempted because Congress, in enacting § 515 [1] and § 502(g)(2) [2] of ERISA, intended to supplement, not supersede, existing state law remedies for the collection of plan contributions. The Court in *Pilot Life*, however, held that the civil enforcement scheme provided by ERISA § 502(a) was intended to be exclusive:

> The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute

[1] Section 515, 29 U.S.C. § 1145 reads: "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

[2] Section 502(g)(2), 29 U.S.C. § 1132(g)(2) reads: "In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan — (A) the unpaid contributions, (B) interest on the unpaid contributions, (C) an amount equal to the greater of — (i) interest on the unpaid contributions, or (ii) liquidated damages provided for under the plan . . ., (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and (E) such other legal or equitable relief as the court deems appropriate."

> as finally enacted . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."

Pilot Life, 481 U.S. at 54 (citation omitted).

The plaintiff claims that the holding in *Pilot Life* does not extend to actions by ERISA plans to recover delinquent contributions, and that ERISA does not preempt independent state law actions against nonemployers. In a case directly on point, however, the Court of Appeals for the Fifth Circuit held that a Louisiana statute similar to chapter 254 was preempted by ERISA. *Iron Workers Mid-South Pension Fund* v. *Terotechnology Corp.*, 891 F.2d 548 (5th Cir. 1990), *cert. denied*, 110 S.Ct. 3272 (1990). In *Iron Workers*, employee benefit plans brought suit both against a contractor which failed to make contributions to the plans as required by collective bargaining agreements and against the owner of the property on which the work was performed. Pursuant to a state lien statute, the funds attempted to enforce liens recorded against the property for contributions owed by the contractor. The court, interpreting *Pilot Life*, held that the state statute was preempted because it attempted to supplement the exclusive civil remedies provided by ERISA. 891 F.2d at 555. The court rejected the plaintiffs' argument that the state statute was merely an aid to the enforcement of a judgment. The court noted that the lien statute did more than provide remedies for collecting judgments; it created substantive rights. *Id.* The Louisiana statute, like the Massachusetts statute, gave ERISA plans rights against not only employers but also property owners. *Id.* The court concluded that the legislative history of ERISA did not indicate any congressional intent to allow states to create new substantive rights for ERISA plans. *Id.* at 556. *See also McMahon* v. *McDowell*, 794 F.2d 100, 107 (3rd Cir. 1986), *cert. denied*, 479 U.S. 971 (1986) (holding that plaintiffs could

not enforce benefit plan contributions through a state regulation that circumvented ERISA's enforcement scheme).

Several state courts have addressed the issues raised by this case. The Court of Appeals of California held that a state mechanics' lien law could not be used by a trust fund fiduciary to collect fringe-benefit contributions allegedly owed by a subcontractor pursuant to a collective bargaining agreement. *Carpenters Southern California Administrative Corp.* v. *El Capitan Development Co.*, 223 Cal. App. 3d 1034, 243 Cal. Rptr. 132 (5th Dist. 1988), *review granted*, 246 Cal. Rptr. 209 (1988). The plaintiff has referred to two decisions holding that state statutes were not preempted by ERISA, but neither decision applies to the situation here. In *Sasso* v. *Vachris*, 66 N.Y.2d 28, 484 N.E.2d 1359, 494 N.Y.S.2d 856 (1985), the Court of Appeals of New York held that a state statute allowing employee benefit funds to recover unpaid contributions directly from the ten largest shareholders of a closely-held corporation was not preempted by ERISA. The court noted, however, that the effect of the state statute was merely to give plaintiffs an enforcement mechanism to recover payments the corporation was already obligated to provide under the collective bargaining agreement. 494 N.Y.S.2d at 859. In *Plumber's Local 458 Holiday Vacation Fund* v. *Howard Immel, Inc.*, 151 Wis.2d 233, 445 N.W.2d 43 (Ct. App. 1989), the Court of Appeals of Wisconsin held that Wisconsin's construction lien law was not preempted by ERISA. The court distinguished the California court's decision in *El Capitan* by noting that the lien created by the California statute referred specifically to ERISA obligations and created a remedy for the collection of ERISA obligations that did not exist under the federal act. According to the Wisconsin court, ERISA does not preempt states from creating "general creditors' rights that may be utilized to effect collections of obligations by all creditors, including a creditor possessing an ERISA claim that has been reduced to a judgment." 445 N.W.2d at 46.

Chapter 254 does much more than provide funds with a method of collecting contributions already owed them under ERISA. Chapter 254 creates a whole new class of liable parties, property owners. The Administrator does not even allege a contractual or other relationship between the Funds and MIT. Nor does the complaint allege that MIT is an employer, participant, or plan beneficiary within the meaning of ERISA. I conclude that chapter 254 is preempted to the extent that it applies to employee benefit plans.

In addition to claiming that ERISA does not preempt chapter 254, the plaintiff has presented two lesser arguments. First, the plaintiff claims that Fed. R. Civ. P. 64 authorizes the use of chapter 254 and, therefore, chapter 254 is saved from preemption by § 514(d) of ERISA, 29 U.S.C. § 1144(d).[3] Rule 64 makes available in federal district courts certain state law remedies that provide "for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action." The remedies listed in Rule 64 include attachment, garnishment, sequestration, and "other corresponding or equivalent remedies." Chapter 254 bears no relation to the remedies described in Rule 64. A lien foreclosure proceeding is not "equivalent" to any of the remedies listed in Rule 64 "because it is not a remedy against the judgment debtor or against a person who is personally indebted to, or in possession of the property of, the judgment debtor." *Bricklayers Fringe Benefit Funds* v. *North Perry Baptist Church*, 590 F.2d 207, 209 (6th Cir. 1979), *cert. denied*, 444 U.S. 834 (1979) (affirming the dismissal of a mechanic's lien foreclosure claim by union against property owners for fringe benefit contributions owed by the contractor). As I stated above, chapter 254 actually creates a substantive right for trustees

[3]Section 514(d) reads: "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law."

of ERISA plans against owners of real property. Chapter 254 is not the type of statute contemplated by Rule 64, and, therefore, is not saved from preemption by that rule.

Finally, the Administrator claims that even if chapter 254 is preempted by ERISA, it is not preempted with respect to the Electrical Workers Educational and Cultural Fund, Local 103 I.B.E.W., because that particular fund is not covered by ERISA. The Educational and Cultural Fund is one of seven funds on behalf of which the Administrator brought this action. The complaint states that all the Funds included in the action were established pursuant to the requirements of 29 U.S.C. § 186. (Complaint, ¶ 2) Under § 3 of ERISA, 29 U.S.C. § 1002(1), funds established pursuant to § 186 are included in the term "employee welfare benefit plan" and, therefore, are covered by ERISA. In sum, the plaintiff's state law claim against MIT is preempted by ERISA.

Accordingly, plaintiff's motion to remand is **denied.** Defendant's motion to dismiss the complaint for failure to state a claim upon which relief may be granted is **allowed.**

/s/ Walter Jay Skinner
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JAMES L. McCOY, ADMINISTRATOR
OF THE ELECTRICAL WORKERS TRUST
FUNDS, LOCAL 103 I.B.E.W.

CASE NUMBER:
No. 90-11925-S

v.

MASSACHUSETTS INSTITUTE
OF TECHNOLOGY

JUDGMENT IN A CIVIL CASE

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED PURSUANT TO THE COURT'S MEMORANDUM AND ORDER. . . . DATED MARCH 1, 1991, THAT THE COMPLAINT IN THE ABOVE ENTITLED CASE IS HEREBY DISMISSED.

DATED: March 5, 1991

/s/ Robert J. Smith, Jr.
Clerk

/s/ Philip J. Lyons
(By) Deputy Clerk

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS

SUPERIOR COURT
CIVIL ACTION
NO. 90-4936

JAMES L. McCOY, ADMINISTRATOR
OF THE ELECTRICAL WORKERS TRUST
FUNDS, LOCAL 103 I.B.E.W.
Plaintiff

v.

COMPLAINT

MASSACHUSETTS INSTITUTE
OF TECHNOLOGY,
Defendant

PARTIES

1. Plaintiff is James L. McCoy, Administrator (hereinafter "Administrator") of the Electrical Workers Trust Funds, Local 103 I.B.E.W. (hereinafter the "Funds") on behalf of the Trustees of said Funds. The Funds include the Electrical Workers Pension Fund, Local 103, I.B.E.W., the Electrical Workers Deferred Income Fund, Local 103, I.B.E.W, Local Union No. 103, I.B.E.W., Health and Welfare Fund, the Electrical Workers Holiday, Vacation and Supplementary Unemployment Benefits Fund, Local 103, I.B.E.W., the Electrical Workers Educational and Cultural Fund, Local 103, I.B.E.W., the Joint Apprenticeship and Training Trust Fund, Local 103, I.B.E.W., and the National Electrical Benefits Fund. Pursuant to G.L. c. 254, § 5, parties also include any "persons in interest" as defined by G.L. c. 254, § 5 who may become parties.

2. The Funds were established pursuant to the requirements of 29 U.S.C. § 186.

3. Defendant Massachusetts Institute of Technology is the duly recorded owner of property situated at 143-153 Albany Street, Cambridge, Middlesex County, Massachusetts. Defendant has a usual place of business at 77 Massachusetts Avenue, Boston, Massachusetts 02139.

G.L. c. 254, § 4 Claim

4. The S.N. Brown Electrical Corp. (hereinafter "S.N. Brown") was a subcontractor who employed participants of the Funds during the months of March, April and May, 1990. Said participants performed labor in the erection, alteration, repair, or removal of the building located at 143-153 Albany Street, Cambridge, Middlesex County, Massachusetts and owned by Defendant.

5. Pursuant to the statutory provisions of G.L. c. 254, § 4, Plaintiff filed a Notice of Contract on May 23, 1990 in the Registry of Deeds. Said Notice of Contract, which describes the property in question, is attached hereto and incorporated herein by reference as Exhibit "A."

6. A copy of Exhibit A was hand delivered to the Defendant on May 23, 1990, and actual notice of Plaintiff's claim has been provided to the Defendant. A copy of said notice is attached hereto and incorporated herein by reference as Exhibit "B".

7. Pursuant to the statutory provisions of G.L. c. 254, § 8 Plaintiff filed a Sworn Statement on May 29, 1990 in the Registry of Deeds. A true copy of said Sworn Statement is attached hereto and incorporated herein by reference as Exhibit "C". Said Statement of Account shows that Plaintiff is owed the estimated principal amount of $30,000.00, plus interest, costs and attorney's fees.

8. Defendant has failed or refused to pay the claim despite demand to do so.

9. The Plaintiff established a lien against said property in the estimated amount of $30,000.00, plus interest, costs and attorney's fees.

WHEREFORE, the Plaintiff pray's for the following relief:

1. That the Court enter judgment against the Defendant Massachusetts Institute of Technology, and award Plaintiff the principal estimated amount of $30,000.00, or such other sum as may be owed upon judgment, plus interest, costs and attorney's fees.

2. That the Court order a sale of the property at 143-153 Albany Street to satisfy Plaintiff's claim and any other persons in interest or parties in interest as provided by G.L. c. 254, § 5.

3. That the Court grant such other and further relief as it deems proper.

COUNT II

10. Plaintiff hereby restates the allegations contained in paragraphs one through nine of the instant Complaint.

11. Pursuant to the statutory provisions of G.L. c. 254, §§ 1 and 8, Plaintiff filed a Sworn Statement on May 29, 1990 in the Registry of Deeds.

WHEREFORE, the Plaintiff prays for the following relief:

1. That the Court enter judgment against Defendant Massachusetts Institute of Technology and award Plaintiff the principal estimated amount of $30,000.00, plus interest, costs and attorney's fees.

2. That the Court order a sale of the property at 143-153 Albany Street to satisfy Plaintiff's claim and any other persons in interest or parties in interest s provided by G.L. c. 254, § 5.

3. That the Court grant such other and further relief as it deems proper.

Respectfully submitted,

JAMES L. MCCOY, ADMINISTRATOR
OF THE ELECTRICAL WORKERS
TRUST FUNDS,
LOCAL 103 I.B.E.W.

By his attorneys,

Murphy, Hesse, Toomey & Lehane
300 Crown Colony Drive
Suite 410
P.O. Box 9126
Quincy, MA 02269-9126
(617) 479-5000

Dated: July 16, 1990

/s/ David W. Healey
David W. Healey
BBO #548262

A TRUE COPY:
ATTEST: /s/ Mary E. Rosa
Deputy Assistant Clerk

Ex. A

NOTICE OF CONTRACT

G.L. c. 254, Section 4

NOTICE is hereby given that by virtue of a written contract, namely a collective bargaining agreement, between S.N. BROWN ELECTRICAL CORP. of 859 Providence Highway, Dedham, MA 02026, subcontractor and the Local Union No. 103 of the International Brotherhood of Electrical Workers, AFL-CIO, said members of said Union and employees of S.N. BROWN ELECTRICAL CORP. and participants in the Electrical Workers Trust Funds, Local 103 I.B.E.W. are to furnish or have furnished labor or perform or have performed labor in the erection, alteration, repair or removal of a building or structure by the S.N. BROWN ELECTRICAL CORP. subcontractor for the Massachusetts Institute of Technology, a Massachusetts corporation with a mailing address of Massachusetts Avenue, Cambridge, Massachusetts as described as follows:

PARCEL I

1. The parcel of land with the buildings and other structures thereon believed to contain about 50,651 square feet bounded:
Southeasterly on Albany Street about 243 feet;
Southwesterly on land now or formerly of Stimpson about 222.84 feet; and
Northwesterly on the southeasterly sideline of Purrington Street about 243 feet; and
Northeasterly on the southwesterly sideline of Cross Street about 222.84 feet.

Also conveying herewith all of the Grantor's rights, title and interest, in and to Purrington Street and Cross Street.

For Owners title reference see Deed at Middlesex County Registry of Deeds at Book 10566, Page 409.

Said contract contains an expiration or completion date of August 31, 1991.

TRUSTEES OF THE ELECTRICAL WORKERS PENSION FUND, LOCAL 103 I.B.E.W., the ELECTRICAL WORKERS DEFERRED INCOME FUND, LOCAL 103, I.B.E.W., the LOCAL UNION NO. 103 I.B.E.W., HEALTH AND WELFARE FUND, the ELECTRICAL WORKERS HOLIDAY, VACATION AND SUPPLEMENTARY UNEMPLOYMENT BENEFITS FUND, LOCAL 103 I.B.E.W., the ELECTRICAL WORKERS EDUCATIONAL AND CULTURAL FUND, LOCAL 103 I.B.E.W., the JOINT APPRENTICESHIP AND TRAINING TRUST FUND, LOCAL 103 I.B.E.W. AND THE NATIONAL ELECTRICAL BENEFITS FUND

By their Administrator and Agent
Hereto Duly Authorized:

Witness my hand and seal

/s/ James L. McCoy
James L. McCoy
Administrator

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. May 23, 1990

Then personally appeared before me the above named James L. McCoy, Administrator and Authorized Agent of the Trustees of the Electrical Workers Pension Fund, Local 103

I.B.E.W., the Electrical Workers Deferred Income Fund, Local 103 I.B.E.W., the Local Union No. 103, I.B.E.W., Health and Welfare Fund, the Electrical Workers Holiday, Vacation and Supplementary Unemployment Benefits Fund, Local 103 I.B.E.W., the Electrical Workers Educational and Cultural Fund, Local 103 I.B.E.W., the Joint Apprenticeship and Training Trust Fund, Local 103 I.B.E.W. and the National Electrical Benefits Fund who being duly sworn did attest to being the Administrator and/or agent of said aforementioned Funds, and that the foregoing Notice of Contract was signed on behalf of and by the authority of the Trustees of said aforementioned Funds, and that said instrument was acknowledged to be the free act and deed of the Trustees of said aforementioned Funds.

/s/ _____

Notary Public

My Commission expires: 11/12/94

Ex. B

MURPHY, HESSE, TOOMEY and LEHANE
ATTORNEYS AT LAW

CROWN COLONY PLAZA
300 CROWN COLONY DRIVE, SUITE 410
P.O. BOX 9126
QUINCY, MA 02269-9126
TEL. 617/479-5000 FAX 479-6469

May 23, 1990

Mr. Kenneth L. Thompson
Massachusetts Institute of Technology
77 Massachusetts Avenue
Physical Plan
E-18-260
Cambridge, MA 02139

RE: Notice of Contract Against
Massachusetts Institute of Technology

Dear Sir or Madam:

Enclosed please find a Notice of Contract with respect to Massachusetts Institute of Technology, 143-153 Albany Street, Cambridge, MA.

Said Notice was filed on May 23, 1990 in the Registry of Deeds.

Very truly yours,

DWH/lbm David W. Healey
cc: James L. McCoy, Administrator
Enclosure

Signature certifies receipt of letter

delivered this letter to Mr. Thompson but he refused to sign it,
on the above date
Joseph Gier, Braintree Cab Driver

Ex. C

COMMONWEALTH OF MASSACHUSETTS

SWORN STATEMENT UNDER
G.L. c. 254, § 8

The undersigned, being duly sworn, does hereby state that the following is a just and true account, with all just credits given, of the amount due the Trustees of the Electrical Workers Pension Fund, Local 103, I.B.E.W., Electrical Workers Deferred Income Fund, Local 103, I.B.E.W., Local Union No. 103, I.B.E.W., Health and Welfare Fund, the Electrical Workers Holiday, Vacation and Supplementary Unemployment Benefits Fund, Local 103, I.B.E.W., the Electrical Workers Educational and Cultural Fund, Local 103, I.B.E.W., the Joint Apprendiceship and Training Trust Fund, Local 103, I.B.E.W. and the National Electrical Benefits Fund for labor performed in the erection, alteration, repair, or removal of a building situated at 143-153 Albany Street, Cambridge, Massachusetts and owned by the Massachusetts Institute of Technology. For further description see Exhibit "A".

ACCOUNT

Item	Amount Due
Unpaid contributions based in part on hourly rate and in part on percentage of gross earnings	$30,000 estimated plus interest, costs and attorney's fees.

Interest begins to accrue at the rate of 1.5% per month commencing on April 15, 1990.

Costs and attorney's fees are owed based upon the number of attorney hours the matter requires, estimated as of this date to approximate $2,000.00.

The undersigned hereby claims a lien upon said building or structure, and upon the interest of the owner, to secure the payment of the debt due as aforesaid, and of the interest, costs and attorney's fees which may arise in enforcing the lien.

TRUSTEES OF THE ELECTRICAL WORKERS PENSION FUND, LOCAL 103 I.B.E.W., the ELECTRICAL WORKERS DEFERRED INCOME FUND, LOCAL 103, I.B.E.W., the LOCAL UNION NO. 103, I.B.E.W., HEALTH AND WELFARE FUND, the ELECTRICAL WORKERS HOLIDAY, VACATION AND SUPPLEMENTARY UNEMPLOYMENT BENEFITS FUND, LOCAL 103, I.B.E.W., the ELECTRICAL WORKERS EDUCATIONAL AND CULTURAL FUND, LOCAL 103, I.B.E.W., the JOINT APPRENTICESHIP AND TRAINING TRUST FUND, LOCAL 103 I.B.E.W. AND THE NATIONAL ELECTRICAL BENEFITS FUND

By their Administrator and Agent
Hereto Duly Authorized:

Witness my hand and seal

/s/ James L. McCoy
James L. McCoy
Administrator

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. May 23, 1990

Then personally appeared before me the above-named James L. McCoy, Administrator and Authorized Agent of the Trustees of the Electrical Workers Pension Fund, Local 103, I.B.E.W., the Electrical Workers Deferred Income Fund, Local 103, I.B.E.W., the Local Union No. 103, I.B.E.W., Health and Welfare Fund, the Electrical Workers Holiday, Vacation and Supplementary Unemployment Benefits Fund, Local 103, I.B.E.W., the Electrical Workers Educational and Cultural Fund, Local 103, I.B.E.W., the Joint Apprenticeship and Training Trust Fund, Local 103, I.B.E.W. and the National Electrical Benefits Fund who being duly sworn did attest to being the Administrator and/or agent of said aforementioned Funds, and that the foregoing Sworn Statement was signed on behalf of and by the authority of the Trustees of said aforementioned Funds, and that said instrument was acknowledged to be the free act and deed of the Trustees of said aforementioned Funds.

/s/ _____

Notary Public

My Commission expires: 5/10/96

APPENDIX F

U.S. Department of Labor
Pension and Welfare Benefits Administration
Washington, D.C. 20210

JAN 30 1991

Mr. G.A. Finch
Querrey & Harrow, Ltd.
La Salle Bank Building, Suite 3600
135 South La Salle Street
Chicago, Illinois 60603-4784

91-08A
ERISA SEC. 3(1)

Dear Mr. Finch:

This is in reply to your request for an advisory opinion regarding the applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Construction Industry Service Corporation Trust (the CISCO Trust) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA and whether the purposes and activities contemplated for the CISCO Trust are permissible under the Labor-Management Cooperation Act of 1978.

You advise that the CISCO Trust was created pursuant to a declaration of trust dated September 19, 1990. The declaration of trust states that the CISCO Trust was being established by the Construction Industry Service Corporation (CISCO), which is comprised of contractors associations and building and construction trade unions. The Executive Committee of the CISCO Board of Directors constitutes the Board of Trustees of the CISCO Trust. The By-Laws of CISCO provide in Article III, Section 1 for three classes of membership as follows:

(a) Full membership in CISCO shall be open to Building and Construction Trades Unions and Contractors and their Associations that have a collective bargaining relationship. Full members shall have voting rights and shall pay full-member dues. Associate membership is available to all other interested parties, including, but not restricted to, owners, developers, governmental agencies, allied professionals, and academic institutions, which associate members shall have no voting rights and shall pay associate-member dues.

(b) The Board of Directors may elect honorary members who shall have no voting rights and shall not be liable for payment of any dues. Qualification for honorary membership shall be any noteworthy contribution towards the purposes of CISCO which in the judgment of the Board of Directors may warrant recognition by such election as an honorary member. An honorary membership may be terminated by the Board of Directors at any time.

Article VI, Section 2(c) of the By-Laws provides that the Board of Directors will have equal numbers of union and contractor representatives.

The declaration of trust provides the purpose of the CISCO Trust in Article II as follows:

This CISCO Trust shall function where allowable by law to:

— operate programs that will carry out the purposes set forth in the Labor-Management Cooperation Act of 1978 and are in furtherance of the tax-exempt purposes of the CISCO Trust as may be exercised by an organization exempt under Section 501(c)(6) of the Internal Revenue Code and its Regulations as they now exist or as they may hereafter be amended;

— improve communication between workers, their representatives and employers in the construction industry;

- identify and expand work opportunities for workers and employers in construction;
- promote efficiency in operations and the economic competitiveness of the construction industry;
- provide a forum for discussion of matters of common concern to employers, workers and their representatives in the industry;
- acquire and operate a computer information system to collect and disseminate information relating to solicitations of bids for construction work;
- inform contractor associations and building and construction trade union representatives about projects, contracts, trends and events affecting the construction industry and establish a network for the exchange of information pertinent to the construction industry;
- provide information concerning all laws governing construction contracts including local, state and federal laws governing wages, hours and work conditions on public works construction;
- sponsor the establishment and operation of local satellite labor and management cooperation committees and trusts throughout the greater Chicago area for one or more of the same purposes as the CISCO Trust has been established;
- sponsor seminars, conferences and meetings to expand the reach of CISCO Trust activities;
- promote the economic and community development of the construction industry;
- promote the general welfare of the construction industry and to promote its standards and specifications;
- sponsor institutional advertising, public relations programs and promotional activities for the good of the public and the construction industry;

— do and perform all other things and undertake such other projects as may be of benefit to the construction industry;
— obtain governmental and philanthropic assistance to CISCO Trust as warranted;
— operate CISCO Trust programs that enhance the ability of CISCO as an organization to accomplish the goals described in the Labor-Management Cooperation Act of 1978.

Section 3(1) of ERISA defines the term "employee welfare benefit plan" to include:

> . . . any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or, benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Based on the information you submitted, it does not appear that the CISCO Trust is an employee welfare benefit plan within the meaning of section 3(1) of ERISA. The benefits described in section 3(1)(A) do not include any benefits provided by the CISCO Trust. Further, it is the Department's posi-

tion that section 3(1)(B) of ERISA does not mean that every arrangement described in section 302(c) of the Labor Management Relations Act of 1947 (the LMRA) constitutes an employee welfare benefit plan within the meaning to section 3(1) of ERISA. In the Department's regulation section 29 C.F.R. 2510.3-1(a) the Department clarified the definition of an "employee welfare benefit plan." With regard to benefits described in section 302(c) of the LMRA, regulation section 2510.3-1(a) provides:

> (3) Section 302(c) of the LMRA lists exceptions to the restrictions contained in subsections (a) and (b) of that section on payments and loans made by an employer to individuals and groups representing employees of the employer. Of these exceptions, only those contained in paragraphs (5), (6), (7) and (8) describe benefits provided through employee benefit plans. Moreover, only paragraph (6) describes benefits not described in section 3(1)(A) of the Act. The benefits described in section 302(c)(6) of the LMRA but not in section 3(1)(A) of the Act are ". . . holiday, severance or similar benefits." Thus, the effect of section 3(1)(B) of the Act is to include within the definition of "welfare plan" those plans which provide holiday and severance benefits, and benefits which are similar (for example, benefits which are in substance severance benefits, although not so characterized).

Although this regulation was adopted prior to the amendment of section 302(c) of the LMRA to add subsection 302(c)(9), the principle is the same. Only those arrangements described in section 302(c) of the LMRA that provide benefits to participants and their beneficiaries would constitute employee welfare benefit pans. The CISCO Trust does not provide, in the Depart-

ment's view, any "benefit" to participants or their beneficiaries within the meaning of section 3(1) of title I of ERISA.

Accordingly, the CISCO Trust would not be covered under title I of ERISA since there is also no indication it is an employee pension benefit plan.

Regarding the second issue you raise, we note that the Labor Management Cooperation Act of 1978 is not under the interpretive authority of this Office or the Department of Labor. Accordingly we are unable to comment on that portion of your request.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, it is issued subject to the provisions of that procedure, including section 10 thereof relating to the effect of advisory opinions.

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretations

APPENDIX G

U.S. Department of Labor
Pension and Welfare Benefits Administration
Washington, D.C. 20210

OCT 26 1984

Mr. Stuart H. Young, Jr.
Hill, Farrer & Burrill
Thirty-Fourth Floor Union Bank Square
445 South Figueroa Street
Los Angeles, California 90071

OPINION NO. 84-40A
SEC. 3(1)

Dear Mr. Young:

This is in reply to your letter of February 14, 1984, requesting an advisory opinion regarding applicability of title I of the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the Southern California IBEW-NECA Labor-Management Cooperation Committee (SCLMCC) is an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA.

You advise that on or about June 1, 1983, the Los Angeles County Chapter, National Electrical Contractor Association (LANECA) and the International Brotherhood of Electrical Workers, Local No. 11 (Local 11) entered into a collective bargaining agreement entitled the "Inside Wiremen's Agreement" (the Agreement) for a term of 3 years. You further advise that section 7.05 to 7.07 of the Agreement created a new entity designed to function as a Labor-Management Cooperation Committee within the meaning of section 302(c)(9) of the Labor-Management Relations Act and the Labor-Management Cooperation Act of 1978. On February 8, 1984, repre-

sentatives of LANECA and Local 11 adopted the Agreement and Declaration of Trust of SCLMCC (the Declaration). The Trust set up under the Declaration is referred to in Article II, Section 1 as SCLMCC and is administered by six trustees, half representing the employers and half representing the union. Article II, Section 4 of the Declaration provides:

> Section 4. Purpose.
>
> The Trust is established solely for the purpose of creating a Labor-Management Cooperation Committee under the authority of Section 6(b) of the Labor-Management Cooperation Act of 1978, 20 U.S.C. Section 175(a); and Section 302(c)(9) of the Taft-Hartley Act, 29 U.S.C. Section 186(c)(9). The permissible purposes of this Committee are established by these federal statutes and include:
>
> a- To improve communication between representatives of labor and management, and engender cooperative and harmonious relations between labor and management in the Southern California electrical industry;
>
> b- To provide workers and employers with opportunities to study and explore new and innovative joint approaches to achieving organizational effectiveness;
>
> c- To assist workers and employers in solving problems of mutual concern not susceptible to resolution within the collective bargaining process;
>
> d- To study and explore ways of eliminating potential problems which reduce the competitiveness and inhibit the economic development of the plant, area or industry;
>
> e- To enhance the involvement of workers in making decisions that affect their working lives;

f- To expand and improve working relationships between workers and managers;
g- To encourage free collective bargaining by establishing continuing mechanisms for communication between employers and their employees through Federal assistance to the formation and operation of labor management committees;
h- To foster improvements in occupational safety and health and other working conditions in the southern California electrical industry; and
i- To engage in any other, lawful activities incidental or related to the accomplishment of these purposes.

The Trustees shall have the sole authority to determine which of the aforedescribed program objectives shall be pursued. This trust is also established for the purpose of paying the necessary costs of administering and continuing this Trust and for accumulation of necessary reserves.

Section 3(1) of ERISA defines the term "employee welfare benefit plan" to include:

> . . . any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services,

or (B) any benefit described in section 302(c) of the Labor-Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

Based on the information you submitted, it is the position of the Department of Labor (the Department) that SCLMCC is not an employee welfare benefit plan within the meaning of section 3(1) of title I of ERISA. SCLMCC does not provide any benefit described in section 3(1)(A) of ERISA. Further, it is the Department's position that section 3(1)(B) of ERISA does not mean that every arrangement described in section 302(c) of the Labor Management Relations Act of 1947 (the LMRA) constitutes an employee welfare benefit plan within the meaning of section 3(1) of ERISA. Only those arrangements described in section 302(c) of the LMRA that provide benefits to participants or their beneficiaries would constitute employee welfare benefit plans.

SCLMCC does not provide, in the Department's view, any "benefit" to participants or their beneficiaries within the meaning of title I of ERISA. Accordingly, SCLMCC would not be covered under title I of ERISA since there is also no indication it is an employee pension benefit plan.

This letter constitutes an advisory opinion under ERISA Procedure 76-1. Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 thereof relating to the effect of advisory opinion.

Sincerely,

Elliot I. Daniel
Acting Assistant Administrator
for Regulations and Interpretations

APPENDIX H

Pertinent Statutes and Rules

SECTION 3(1) OF ERISA; 29 U.S.C. § 1002(1).

§ 3. For purposes of this title: (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

SECTION 502(g)(2) OF ERISA; 29 U.S.C. § 1132(g)(2)

In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 in which a judgment in favor of the plan is awarded, the court shall award the plan —

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of —

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A).

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1954.

SECTION 505 OF ERISA; 29 U.S.C. § 1135

§ 505. Subject to title III and § 109, the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this title. Among other things, such regulations may define accounting, technical, and trade terms used in such provisions; may prescribe forms; and may provide for the keeping of books and records, and for the inspection of such books and records (subject to § 504(a) and (b)).

SECTION 514(a) OF ERISA; 29 U.S.C. § 1144(a)

§ 514(a). Except as provided in sub-section (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now of hereafter relate to any employee benefit plan described in § 4(a) and not exempt under § 4(b). This section shall take effect on January 1, 1975.

SECTION 514(d) OF ERISA; 29 U.S.C. § 1144(d)

§ 514(d). Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in § 111 and § 507(b)) or any rule or regulation issued under any such law.

SECTION 515 OF ERISA; 29 U.S.C. § 1145

§ 515. Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

SECTION 301(a) OF THE LMRA; 29 U.S.C. § 185(a)

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

SECTION 302(c) OF THE LMRA; 29 U.S.C. § 186(c)

§ 302(c). Exceptions. The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud

or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire

to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided, That the requirements of clause (B)

of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959; or (9) with respect to money or other things of value paid by an employer to a plant, area or industry wide labor management committee established for one or more of the purposes set forth in § 5(b) of the Labor Management Cooperation Act of 1978.

28 U.S.C. § 2072

§ 2072. Rules of Procedure and Evidence; Power to Prescribe.

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under § 1291 of this title.

RULE 64 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 64. Seizure of Person or Property. At the commencement of and during the course of an action, all remedies provid-

ing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

RULE 69(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 69. Execution. (a) In General. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

Labor Management Cooperation Act of 1978

ASSISTANCE TO PLANT, AREA, AND INDUSTRYWIDE LABOR MANAGEMENT COMMITTEES

Sec. 6

(a) This section may be cited as the "Labor Management Cooperation Act of 1978".

(b) It is the purpose of this section

(1) to improve communication between representatives of labor and management;

(2) to provide workers and employers with opportunities to study and explore new and innovative joint approaches to achieving organizational effectiveness;

(3) to assist workers and employers in solving problems of mutual concern not susceptible to resolution within the collective bargaining process;

(4) to study and explore ways of eliminating potential problems which reduce the competitiveness and inhibit the economic development of the plant, area or industry;

(5) to enhance the involvement of workers in making decisions that affect their working lives;

(6) to expand and improve working relationships between workers and managers; and

(7) to encourage free collective bargaining by establishing continuing mechanisms for communication between employers and their employees through Federal assistance to the formation and operation of labor management committees.

(c) (1) Section 203 of the Labor-Management Relations Act, 1947, is amended by adding at the end thereof the following new subsection:

"(e) The Service is authorized and directed to encourage and support the establishment and operation of joint labor management activities conducted by plant, area, and industrywide committees designed to improve labor management relationships, job security and organizational effectiveness, in accordance with the provisions of section 205A.".

(2) Title II of the Labor-Management Relations Act, 1947 is amended by adding after section 205 the following new section:

"SEC. 205A.

(a) (1) The Service is authorized and directed to provide assistance in the establishment and operation of plant, area and industrywide labor management committees which —

"(A) have been organized jointly by employers and labor organizations representing employees in that plant, area, or industry; and

"(B) are established for the purpose of improving labor management relationships, job security, organizational effectiveness, enhancing economic development or involving workers in decisions affecting their jobs including improving communication with respect to subjects of mutual interest and concern.

"(2) The Service is authorized and directed to enter into contracts and to make grants, where necessary or appropriate, to fulfill its responsibilities under this section.

"(b) (1) No grant may be made, no contract may be entered into and no other assistance may be provided under the provisions of this section to a plant labor management committee unless the employees in that plant are represented by a labor organization and there is

in effect at that plant a collective bargaining agreement.

"(2) No grant may be made, no contract may be entered into and no other assistance may be provided under the provisions of this section to an area or industrywide labor management committee unless its participants include any labor organizations certified or recognized as the representative of the employees of an employer participating in such committee. Nothing is this clause shall prohibit participation in an area or industrywide committee by an employer whose employees are not represented by a labor organization.

"(3) No grant may be made under the provisions of this section to any labor management committee which the Service finds to have as one of its purposes the discouragement of the exercise of rights contained in section 7 of the National Labor Relations Act (29 U.S.C. 157), or the interference with collective bargaining in any plant, or industry.

"(c) The Service shall carry out the provisions of this section through an office established for that purpose.

"(d) There are authorized to be appropriated to carry out the provisions of this section $10,000,000 for the fiscal year 1979, and such sums as may be necessary thereafter."

(d) Section 302(c) of the Labor Management Relations Act, 1947, is amended by striking the word "or" after the semicolon at the end of subparagraph (7) thereof and by inserting the following before the period at the end thereof: "; or (9) with respect to money or other things of value paid by an employer to a plant, area or industry-

wide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978".

(e) Nothing in this section or the amendments made by this section shall affect the terms and conditions of any collective bargaining agreement whether in effect prior to or entered into after the date of enactment of this section.

MASSACHUSETTS G.L. c. 254, § 1

§ 1. Labor performed; employees; trustee or trustees. A person to whom a debt is due for personal labor performed in the erection, alteration, repair or removal of a building or structure upon land, by virtue of an agreement with, or by consent of, the owner of such building or structure, or of a person having authority from or rightfully acting for such owner in procuring or furnishing such labor, shall, under the provisions of this chapter, other than sections 3 and 4, have a lien upon such building or structure and upon the interest of the owner thereof in the lot of land upon which it is situated, for not more than eighteen days' work actually performed during the forty days next prior to his filing a statement as provided in section 8.

For purposes of this chapter, a person shall include any employee of any employer and the trustee or trustees of any fund or funds, established pursuant to section 302 of the Taft Hartley Law (29 USC 186), providing coverage or benefits to said person. The trustee or trustees of any such fund or funds shall have all the liens under this chapter that any person has. The trustee or trustees shall also have the right to enforce said liens pursuant to this chapter.

MASSACHUSETTS G.L. c. 254, § 4

§ 4. Written contract; subcontractors; notices; completion date. Whoever, subsequent to the date of the original contract,

furnishes labor or material, or both labor and material, or performs labor, under a written contract with a contractor, or with a subcontractor of such contractor, may file in the registry of deeds for the county or district where such land lies a notice of his contract substantially in the following form:

> Notice is hereby given that by virtue of a written contract dated , between , contractor (or sub-contractor), and said is to furnish or has furnished labor or material, or both labor and material, or perform labor in the erection, alteration, repair or removal of a building or structure by , contractor, for , owner, on a lot of land described as follows:
>
> Said contract is to be completed on or before

A notice of any extension of such contract, stating the date of which it is extended, shall also be filed or recorded in said registry prior to the date stated in the notice of the contract for the completion thereof.

Upon filing a notice, as hereinbefore provided, and giving actual notice to the owner of such filing, the sub-contractor shall have a lien to secure the payment of all labor and material, which he is to furnish or has furnished, upon the building or structure, and upon the interest of the owner, as appears of record at the time of such filing, in the lot of land on which said building or structure is situated. But such lien shall in no event exceed the amount due or to become due under the original contract when notice of the filing of the sub-contract is given by the sub-contractor to the owner; and the time for the performance of the contract of the sub-contractor shall not be extended beyond the time for the performance of the original contract and any extension thereof, if the objection thereto of the owner is filed in the registry of deeds and actual notice of

such objection is given by the owner to the sub-contractor within five days after the owner received notice of the filing of the contract as provided in this section.

Such notice may also be filed by the trustee or trustees of a fund or funds, described in section one, providing coverage or benefits to any person performing labor under a written contract with a contractor, or with a subcontractor of such contractor.

If the contract does not contain a completion date, the person filing the notice of contract in the registry of deeds shall set forth a date of completion which shall be subject to objection by the owner as set forth above if the date of completion is later than the time for the performance of the original contract and any extension thereof. For the purposes of this chapter the date of completion stated in the notice of contract filed in the registry of deeds or in any properly filed notice of extension of such contract shall be the date on which the contract is to be performed.

H.R. Rep. No. 889, 96th Cong., 2d Sess., Part II 48-49, reprinted in 1980 U.S. Code Cong. & Ad. News 2918, 3038

7. Enforcement — liquidated damages with respect to delinquent contributions. Under the bill, in the case of an action to collect withdrawal liability, a court may award a plan liquidated damages. The Committee has concluded that in certain situations, reasonable attorneys fees, court costs, and liquidated damages should be awarded to a plaintiff in an action to collect delinquent plan contributions. The Committee's amendment provides that in the case of a civil action by any person to collect delinquent multiemployer plan contributions, regardless of otherwise applicable law, the court before which the action is brought may award the plaintiff (1) reasonable attorney's fees, (2) court costs, and (3) liquidated damages not to exceed 20 percent of the amount of delinquent contributions as determined by the court. However, these items are to be

awarded to a plaintiff only to the extent that the multiemployer plan in question provided for such an award. The bill preempts any State or other law which would prevent the award of reasonable attorney's fees, court costs or liquidated damages or which would limit liquidated damages to an amount below the 20 percent level. However, the bill does not preclude the award of liquidated damages in excess of the 20 percent level where an award of such a higher level of liquidated damages is permitted under applicable State or other law. The Committee amendment does not change any other type of remedy permitted under State or Federal law with respect to delinquent multiemployer plan contributions.

S. 1076: Senate Labor and Finance Committee's Joint Explanation, 126 Cong. Rec. 20202

Under the bill, in the case of civil action by any person to collect delinquent multiemployer plan contributions, regardless of otherwise applicable law, in which a judgment in favor of the plan is awarded, the court before which the action is brought must award the plan (1) the unpaid contributions; (2) interest on the unpaid contributions; (3) an amount equal to the greater of interest on the unpaid contributions or liquidated damages under the plan not to exceed 20 percent of the amount of delinquent contributions as determined by the court. The bill preempts any State or other law which would prevent the award of reasonable attorney's fees, court costs or liquidated damages or which would limit liquidated damages to an amount below the 20 percent level. However, the bill does not preclude the award of liquidated damages in excess of the 20 percent level where an award of such higher level of liquidated damages is permitted under applicable State or other law. This does not change any other type of remedy permitted under State or Federal law with respect to delinquent multiemployer plan contributions.

126 Cong. Rec. 20180 (statements of Senators Matsunaga and Williams)

Mr. MATSUNAGA * * *

If the floor manager will yield further, the recourse available to multiemployer pension plans under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. May I inquire of the floor manager, does the bill improve the legal recourse available to plans against delinquent employers?

Mr. WILLIAMS. Yes, it does. We have appreciated the opportunity to work with the Senator in connection with a situation that arose in Hawaii that had a great deal of appeal to those of us who are on the Labor and Human Resources Committee. We, of course, had the Hawaiian preemption question before us. In the process of considering it, we have had the pleasure of discussion with our good friend from Hawaii and his ideas were so well received that others wanted to join in, as a matter of fact, but it was so unique and so good that we wanted to make sure it was preserved. We deal with it that way, as exclusive to Hawaii.

Mr. MATSUNAGA. Again I express my appreciation.

Mr. WILLIAMS. On this whole question of delinquent contributions and the withdrawal liability collection, the bill provides a direct and I suggest unambiguous cause of action under ERISA to a plan against a delinquent employer.

Mr. MATSUNAGA. If I may pose a further question, in some recent cases such as the Washington Area Carpenters Fund Overhead Door Co. case, a simple collection action brought by plan trustees has been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise of contributions and the plan's entitlement to the contributions. Would the bill correct this situation?

Mr. WILLIAMS. I feel that it would correct the situation. It is essential to the financial health of multiemployer plans that they and their actuaries be able to rely on an employer's contribution promises.

Further, plan participants for whom the employer promises to make pension contributions to the plan in exchange for their labor are entitled to rely on their employer's promises. The bill clarifies the law in this regard by providing a direct ERISA cause of action against a delinquent employer without regard to extraneous claims or defenses.

Mr. MATSUNAGA. The Senator, of course, will agree that the provisions for employer withdrawal liability are central to this legislation. Will these same principles apply to claims by a plan for withdrawal liability?

Mr. WILLIAMS. Affirmative. Like suits to collect delinquent contributions, it is intended that a plan's claim for withdrawal liability not be subject to extraneous claims and defenses.

Mr. MATSUNAGA. One final question, if the Senator will yield further.

The Bill directs the courts in delinquency cases to award a plan which wins judgment not only the delinquent contributions, but other costs and damages as well. Do those provisions constitute a maximum as well as a minimum restriction on the relief available to plans?

Mr. WILLIAMS. Those provisions, as we drafted and intended them, are a minimum but not a maximum.